89-1705

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ATLAS CORPORATION, KERR-MCGEE CHEMICAL CORPORATION, PATHFINDER MINES CORPORATION, QUIVIRA MINING COMPANY, UMETCO MINERALS CORPORATION AND UNION CARBIDE CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the Claims Court is without jurisdiction over claims by government contractors seeking contract reformation based on a mutual mistake of fact as to hazards that were not fully recognized at the time of contracting.

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the court of appeals: [1]

Plaintiffs-appellants: Atlas Corporation, Kerr-McGee Chemical Corporation, Quivira Mining Company, Western Nuclear, Inc., Atlantic Richfield Company, Umetco Minerals Corporation, Union Carbide Corporation, Homestake Mining Company of California, Inc., and Pathfinder Mines Corporation.

Defendant-appellee: United States of America.

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[1] Petitioners' statements pursuant to Sup. Ct. Rule 28.1 are set forth at App. E, 53a-54a.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-26a) is reported at 895 F.2d 745. The opinion of the Claims Court (App. B, 27a-46a) is reported at 15 Cl. Ct. 681.

JURISDICTION

The judgment of the court of appeals (App. C, 47a) was entered on February 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Tucker Act, 28 U.S.C. § 1491, as amended, provides in pertinent part:

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

STATEMENT OF THE CASE

1. Petitioners are uranium and thorium milling companies that, from the 1940's through the 1960's, manufactured substantial quantities of uranium and thorium products for national defense purposes pursuant to contracts with the Atomic Energy Commission. App. A, 2a-3a. In order to meet the nation's urgent defense needs in the period immediately following the Second World War, the Government encouraged private companies to enter the fledgling uranium and thorium milling industry by providing assurances, in the contracts, that the companies would be able to recover their costs and earn a reasonable profit from their operations. *Id.* at 2a.

The milling of uranium and thorium ore produces a sand-like residue called "tailings." Because a typical ton of domestic ore contains only about two to eight pounds of uranium and thorium, the residual tailings are extensive. The tailings are stored in large piles on land adjacent to the mills. App. A, 3a.

While nearly all of the uranium or thorium is extracted from the ore during processing, the tailings continue to emit residual low-level radiation, primarily in the form of radon gas. Although this fact was known to the contracting parties, its consequences were not fully understood at the time the contracts were entered into and performed. It was not until the late 1970's that the long-term potential health hazards associated with mill tailings and radon emissions were widely recognized. To alleviate those hazards, costly reclamation measures are

required, such as seepage control, regrading the piles and covering them with clay and soil, and then placing a top cover consisting of either vegetation or crushed rock. Petitioners have undertaken such costly measures pursuant to requirements imposed by federal and state law, and also pursuant to petitioners' general obligation to conduct their business in a manner that does not endanger the public. App. A, 3a-4a.

2. Petitioners filed suit in the Claims Court, contending that the Government was legally obligated to bear financial responsibility for the costs associated with stabilization of the mill tailings that were generated from the uranium and thorium production under petitioners' contracts with the Government. In their complaints, petitioners contended that the Government's obligation arises from the doctrine of contract reformation for mutual mistake. Based upon the contracting parties' understanding that the Government would compensate the companies for all significant costs associated with their operations, including the costs of tailings disposal, petitioners alleged that had the parties recognized the extent of the potential hazards of tailings piles and the costs of suppressing those hazards, the contracts would have explicitly stated the parties' intent that the Government bear such costs.[1]

3. The Government moved for judgment on the pleadings, raising numerous grounds in support of the motion. Almost three years later, the Claims Court entered judgment on the pleadings in favor of the Government, not on any of the grounds advanced by the Government, but on the basis of a novel jurisdictional theory developed by the court itself. App. B, 27a-46a.

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[1] Petitioners contended in the alternative that the Government is liable for those costs under an implied-in-fact contract theory distinct from their reformation claim and under express cost-reimbursement provisions of the contracts. The courts below dismissed these claims and petitioners do not press them here.

Rejecting the parties' arguments as to the "theory of contract reformation in general," App. B, 34a, the Claims Court concluded that "the matter must be resolved by reference to the nature of the contractual jurisdiction this court can exercise pursuant to 28 U.S.C. § 1491." *Id.* The court observed that Section 1491 grants jurisdiction "only where the government has agreed to be bound," and that "for reformation to form the predicate for a money judgment under 28 U.S.C. § 1491, there must be a prior agreement by the government as to the provisions involved which can be so given effect." *Id.* The court therefore reasoned that "[t]he consensual nature of the contract jurisdiction conferred by 28 U.S.C. § 1491 requires that the agreement be limited to what was actually negotiated on the basis of circumstances then known to the negotiators." *Id.* at 35a.

The Claims Court asserted, without support in the pleadings or reference to any other source, that "[k]nowledge" of the potential hazards associated with the low-level radiation produced by mill tailings was "beyond the state of the art during the period of time the contracts involved in these matters were negotiated and performed." App. B, 32a. Based on this finding that the hazards of mill tailings were not only not known to the parties, but were "not knowable" at the time of the negotiations, the Court concluded that "no agreement could have been made on this matter which can now be placed in effect by means of reformation." *Id.* at 34a-35a.

4. The United States Court of Appeals for the Federal Circuit affirmed. App. A, 1a-26a. Although conceding that petitioners had "alleged an appealing fact situation," *id.* at 18a, the court of appeals expressly upheld the Claims Court's reasoning on the jurisdictional issue, stating that, because the mill tailings hazards were "not contemplated by the parties," it followed that "any contractual claim against the government would arise, not

out-of the government's agreement to be bound, but out of an obligation that is imposed by law." *Id.* at 19a. The Federal Circuit therefore concluded:

> Regardless of the alleged "justness" of the plaintiffs' claims, the Claims Court has no jurisdiction over them. The Claims Court's jurisdiction is limited, and where the government has not agreed to be bound, either expressly or impliedly, there is no contractual jurisdiction.

Id.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the jurisdiction of the Claims Court over government contract cases presenting contract reformation claims. The court of appeals' decision effects a fundamental change in the nature of the Claims Court's jurisdiction and insulates the United States from liability in a burgeoning class of cases seeking to establish liability for the substantial costs of alleviating hazards that were not fully recognized at the time of contracting. Unless reversed, the decision below will deprive government contractors of any judicial forum in which to assert such claims against the United States.

I.

It is well-established that the Tucker Act bestows upon the Claims Court jurisdiction over contracts that are either express or implied-in-fact, and not over those implied-in-law. *See Merritt v. United States*, 267 U.S. 338, 341 (1925). That principle is not challenged here. The courts below, however, have introduced a distinction between "knowable" and "unknowable" facts—decreeing that where a mutual mistake concerns an "unknowable" fact, there cannot possibly be an "actual" agreement that could form the basis for Claims Court jurisdiction and contract reformation. This reasoning not only is illogical, it finds no support in the Tucker Act

or in cases applying principles of contract reformation generally.

A. The distinction between "knowable" and "unknowable" facts is not found anywhere in the language of the Tucker Act. Moreover, this distinction, which was crafted by the Claims Court and adopted by the Federal Circuit below, signifies an unprecedented and fundamental shift in the contractual jurisdiction of the Claims Court. Petitioners have found no other case that relies on this distinction, and the Claims Court, the Government, and the Federal Circuit have collectively failed to cite any such case. In fact, the case law reveals that "knowability" has played no part in the Claims Court's previous analysis of its jurisdiction over contract reformation claims or other contract claims.

The Claims Court has repeatedly exercised its jurisdiction to reform contracts based upon a mutual mistake of fact where the parties' error was no more "knowable" than it is here. A case in point is *National Presto Industries, Inc. v. United States*, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1966), in which the Court of Claims granted reformation of a contract to permit reimbursement for the cost of an additional step in the process of manufacturing artillery shells. In both *National Presto* and the instant case, the parties were engaged in developing a new technology; in both cases, the parties were a "pair of gropers," *id.* at 109, unaware of a present condition of the manufacturing process that was not fully understood until later. In both cases, the agreement to be enforced was an understanding that the United States would pay the full costs of production. It is that underlying agreement that provides a basis for Claims Court jurisdiction, regardless of the "knowability" of the parties' error.[2]

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[2] Similarly, in *R.M. Hollingshead Corp. v. United States*, 111 F. Supp. 285 (Ct. Cl. 1953), neither party knew that it was impossible to store DDT concentrate in the metal containers required by the

Furthermore, the court of appeals' reliance on the "knowable"/"unknowable" distinction to effect a narrowing of the Claims Court's Tucker Act jurisdiction is at odds with this Court's admonition in *United States v. Emery, Bird, Thayer Real'y Co.*, 237 U.S. 28, 32 (1915), not to draw fine distinctions in construing that statute. To the contrary, the Tucker Act, which this Court described as "the great act of justice embodied in the jurisdiction of the Court of Claims," is not "to be construed strictly and read with an adverse eye." *Id.*

B. The purported distinction between "knowable" and "unknowable" facts must be rejected as illogical and without relevance to determining whether an "actual" agreement exists that can support Tucker Act jurisdiction. It is simply not necessary that a fact be "knowable" in order for the parties to have an agreement that encompasses that fact. As the Federal Circuit acknowledged, petitioners contend that the contracts at issue "contained pricing provisions designed so that the private companies could recover their costs, plus a reasonable profit." App. A, 2a. This statement expresses the under-

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contract without a loss of its clear color, which was also required by the contract. Nevertheless, the Court of Claims denied the Government's motion to dismiss a complaint seeking payment for the murky DDT, noting that "[a]t the time the contract here involved was made, DDT concentrate was a relatively new product." *Id.* at 286.

The Federal Circuit attempted to distinguish *National Presto*, *Hollingshead*, and other mutual mistake cases by suggesting that the underlying agreement was enforceable because the "existence" of the unknown fact was "knowable." App. A, 8a-10a. Thus, the court noted that in *National Presto*, the parties knew that there might be additional steps in the production process. *Id.* at 9a. In the instant case, however, the Federal Circuit has recognized petitioners' contention that the contracting parties knew the milling process would produce tailings that would emit low-level radioactivity. *Id.* at 3a. Accordingly, there is no basis for distinguishing the instant case from *National Presto* or other mutual mistake cases in which the Claims Court exercised its Tucker Act jurisdiction.

lying agreement that petitioners seek to enforce—an agreement to cover their costs. This alleged agreement is sufficient to confer jurisdiction on the Claims Court, regardless of whether the potential hazards of tailings and the associated costs of abating those hazards were "unknowable" or simply "unknown" to the parties.

C. The reasoning of the courts below on the jurisdictional issue would bar reformation claims against the United States that the common law would allow against a private party. Although the courts below asserted that their reasoning was consonant with the law of reformation generally, the common law is to the contrary.

To be sure, the common law of mutual mistake will only reform a contract to reinstate the parties' actual agreement.[3] The common law cases, however, have rejected the use of the "knowable"/"unknowable" distinction embraced by both the Claims Court and the Federal Circuit. As the court observed in *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 64 (W.D. Pa. 1980):

> The law of mistake has not distinguished between facts which are unknown but presently knowable, *e.g.*, *Raffles v. Wichelhaus*, 2 H&C 906 (1864), and facts which presently exist but are unknowable, *e.g.*, *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887). Relief has been granted for mistakes of both kinds.

What the common law recognizes, but the Federal Circuit ignores, is that parties ignorant of a hazard may still enter into an agreement that encompasses the unforeseen liability. In such a situation there may be an *actual* agreement that should be enforceable under principles of contract reformation, regardless of whether the claim is heard in state court, federal district court, or the Claims Court.

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[3] *See* E. Farnsworth, *Contracts* § 7.5 at 469 (1982).

The purported distinction between "knowable" and "unknowable" facts thus has no bearing on the issue of the Claims Court's jurisdiction. In determining whether an agreement existed that can provide a basis for jurisdiction under the Tucker Act (or even a basis for contract reformation at common law), the issue is whether the plaintiff can produce evidence to substantiate the alleged agreement. The Federal Circuit's use of the concept of "unknowability" has no statutory or common law basis, needlessly creates different rules for the treatment of the United States and private parties, and unfairly denies petitioners and other similarly situated plaintiffs an opportunity to establish their claims in court.

II.

The question presented here is worthy of review because it concerns the jurisdiction of the only court empowered to hear petitioners' contract claims, it involves claims of substantial value, and it arises in a factual context of growing societal importance.

A. Denial of jurisdiction means denial of any remedy to petitioners, because the Claims Court possesses nationwide and exclusive jurisdiction with regard to large contract damage claims against the United States. Although the district courts have concurrent jurisdiction over some contract claims against the Government, damages may not exceed $10,000. 28 U.S.C. § 1346(a)(2). Because claims seeking reimbursement for the costs of environmental remediation typically involve amounts far in excess of $10,000, the Claims Court is the only forum in which petitioners and similarly situated parties may seek contract reformation and damages from the United States.

B. This Court has previously granted certiorari in a case involving construction of the Tucker Act on the ground that it involved issues of substantial importance concerning the liability of the United States; the Court observed that in that case alone the damages claimed

might amount to $100 million. *See United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983). The same may be said of the instant case.

The amount of money at stake in petitioners' claims is very substantial. As of the summer of 1989, Kerr-McGee had expended approximately $36 million for reclamation at a single mill tailings site in Illinois. Depending on the approach to be taken in further remediation efforts at the site, the Nuclear Regulatory Commission has estimated that additional expenditures will range from $12 to $90 million.[4] Considering that recovery was sought for expenditures at a total of ten tailings sites in the cases consolidated before the Claims Court, it is evident that the decision of the court of appeals will extinguish claims of enormous value.

C. It is significant that the distinction between "knowable" and "unknowable" facts has been used to deny jurisdiction in a case involving contract reformation based on a mutual mistake as to a hazard that was not recognized at the time of contracting. Even if this new jurisdictional principle were limited to factually similar cases in the future—and there is no reason why it would be so limited—the principle would still have a recurring impact on cases of great societal interest.

1. The decision below sets a precedent allowing the Claims Court to dismiss, on the pleadings, future claims for contract reformation based on mutual mistake whenever the mistake involves a failure of the contracting parties to recognize a hazard then in existence. According to the court of appeals, a hazard not yet recognized by society may be deemed "unknowable" to the contracting parties—and as a consequence, it is supposedly impossible for the parties to have entered into an agreement that allocates responsibility for the hazard.

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[4] *See* S. Rep. No. 101-60, 101st Cong., 1st Sess. 14-15 (1989).

The result is a "Catch-22" that bars mutual mistake claims based on unrecognized hazards. On the one hand, in order to seek reformation on the ground of mutual mistake, a government contractor must allege that the parties did not fully recognize the hazard at issue. Yet on the other hand, this very allegation is the basis on which the Federal Circuit will apparently declare that the parties' shared ignorance precludes *any* possibility that an agreement existed that might be the basis for contract reformation.

2. Petitioners' claims will not be the only ones affected by the decision below. Also at stake are the claims of other government contractors against the United States for contract reformation based on mutual mistakes as to hazards poorly understood at the time of contracting. In recent years, there has been a considerable increase in litigation over hazards that were once unknown. As noted by one commentator,

> The Agent Orange controversy is but one of a number of current cases involving the potential liability of a government contractor for injuries caused by the manufacture of a product for the government. Other disputes center around the domestic use of herbicides . . . or asbestos . . . . [In these cases, at] the time they entered the contract, the government and the contractor often possessed little or no information indicating that the materials or finished product would be hazardous.

Blechman, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*," 36 U. Miami L. Rev. 489, 491 n.8 (1982).

Unless overturned, the decision below would extinguish all claims by government contractors for contract reformation based on the failure to recognize a hazard at the time of contracting. This result is directly contrary to the goal of Congress in enacting the Tucker Act, which

was to "give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances." 18 Cong. Rec. 2680 (1887) (remarks of Rep. Bayne) (quoted in *United States v. Mitchell*, 463 U.S. at 213-14).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 3, 1990

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 89-1205 to 89-1212

ATLAS CORPORATION, KERR-MCGEE CHEMICAL CORPORATION, QUIVIRA MINING COMPANY, WESTERN NUCLEAR, INC., ATLANTIC RICHFIELD COMPANY, UMETCO MINERALS CORPORATION and UNION CARBIDE CORPORATION, HOMESTAKE MINING COMPANY OF CALIFORNIA, INC., and PATHFINDER MINES CORPORATION,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Feb. 2, 1990

Before MARKEY, Chief Judge, BENNETT, Senior Circuit Judge,* and NEWMAN, Circuit Judge.

BENNETT, Senior Circuit Judge.

This appeal is from the final judgment of the Claims Court (Merow, J.) granting the government's motion for

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* Due to the recusal of another judge, the author was not assigned to the panel until after oral arguments in this case. The author has reviewed the audio tapes of the oral arguments. Counsel were given the opportunity to object to this procedure in open court, but did not.

judgment on the pleadings and dismissing the complaints. 15 Cl.Ct. 681 (1988). We affirm.

BACKGROUND

The plaintiffs are corporations, or successors to corporations, which entered into contracts with the government for the production of uranium or thorium.

Following the Second World War, uranium production in the United States was practically nonexistent, and the military was dependent on foreign sources. In the late 1940's, the Atomic Energy Commission (AEC) began a major program to encourage the domestic production of uranium and alternative sources of atomic energy, such as thorium. The AEC encouraged private companies to enter the uranium milling industry by contracting with them for the production of uranium. The contracts contained pricing provisions designed so that the private companies could recover their costs, plus a reasonable profit. In addition, the government funded substantial research and development efforts to improve uranium milling technology, and it provided substantial technical services to the industry. The Atomic Energy Acts of 1946 and 1954 each provided that the federal government could be the sole owner of uranium products. Through statutes and regulations, licensing, administrative oversight, and its contracts, the federal government maintained pervasive control over all aspects of uranium and thorium procurement, production, sales and disposal, starting in the late 1940's and continuing through the 1950's.

The plaintiffs were awarded uranium production contracts by the AEC or have acquired or merged with the original contractor and have succeeded to the interests and obligations of the original contractor. Plaintiff Kerr-McGee is the successor in interest to thorium production contracts. For the purposes of this litigation, the parties have not alleged any significant differences between ura-

nium and thorium production. The contracts between the government and the plaintiffs were amended several times and spanned the period from 1950 to 1970. Beginning in 1964, the uranium producers were permitted to sell their products to private parties without government permission.

Uranium and thorium milling operations produce a sand-like residue called "tailings." Typical domestic uranium ore usually contains only about two to eight pounds of uranium per ton of ore, so the residual tailings may be quite extensive. The tailings are ordinarily stored in large tailings piles, usually located on the land adjacent to the mills. Tailings from the production of uranium pursuant to the contracts with the government have been commingled with the tailings from the production of uranium for private parties.

While nearly all of the uranium is extracted from the ore, the tailings continue to emit residual low-level radiation, primarily in the form of radon gas. According to the appellants, this fact was known to the parties to the contracts, but its significance was not fully understood at the time of the contracts. It was not until the late 1970's that the long-term potential health hazards associated with mill tailings and the radon emissions were widely recognized. To alleviate those hazards, costly measures are required to stabilize existing tailings piles. Such measures include seepage control, regrading the piles and covering them with clay and soil, and revegetating the piles or covering them with crushed rock.

Because of the potential health hazards associated with uranium mill tailings, Congress enacted the Uranium Mill Tailings Radiation Control Act (UMTRCA) Pub.L. No. 95-604, 92 Stat. 3021 (Nov. 8, 1978), codified at 42 U.S.C. §§ 2022, 2113, 2114, 7901-7942 (1982). Title I of the Act provides that the federal government has responsibility for the stabilization and decommissioning of

all inactive mill sites which were not licensed on January 1, 1978. 42 U.S.C. §§ 7912-7919. Title II of the Act authorizes the Environmental Protection Agency to develop regulations for the stabilization and decommissioning of mill sites which remained active after January 1, 1978. 42 U.S.C. §§ 2022, 2113. Under title II of the UMTRCA, the licensees are responsible for complying with the federal regulations concerning stabilization of the mill tailings piles, decontamination and decommissioning of the mill plants, and reclamation of the plant site. 42 U.S.C. § 2113. The EPA and the Nuclear Regulatory Commission have issued regulations governing the stabilization of the licensed mill sites. 40 C.F.R. pt. 192 (1988); 10 C.F.R. pts. 40, 150 (1989). In addition, some states have enacted laws directed to the hazards of radon gas.

The plaintiffs held licenses on January 1, 1978, for active facilities. As a result of the UMTRCA and the regulations issued pursuant to that Act, and also possibly as a result of the plaintiffs' recognition of general obligations to conduct their business in a manner that does not expose the public to harm, the plaintiffs have undertaken costly measures to stabilize the tailings piles and to decontaminate and reclaim the uranium and thorium mill sites. In their complaints, the plaintiffs sought recovery of the costs associated with stabilization of the mill tailings that were generated from the uranium and thorium production under the completed contracts with the government.

The plaintiffs based their complaints on various theories. All of the plaintiffs sought reformation of the contracts due to mutual mistake. All of the plaintiffs other than Atlas alleged breach of express contract. Western Nuclear, Homestake, and Pathfinder alleged breach of an implied-in-fact contract. Western Nuclear included allegations of agency and that the UMTRCA is a compensable Fifth Amendment taking, violates the equal protection clause, and is an *ex post facto* law.

The government moved, pursuant to RUSCC 12(c) and 12(h), for judgment on the pleadings arguing that the plaintiffs had failed to state a claim for relief. The Claims Court granted the government's motion and dismissed the complaints, except for Western Nuclear's equal protection and *ex post facto* claims, which it transferred to the United States District Court in Colorado. All of the plaintiffs filed appeals. On appeal, Western Nuclear abandoned its agency claim.

ISSUE

The issue in this appeal is whether the Claims Court erred in granting judgment on the pleadings and in dismissing the plaintiffs' reformation, breach of express contract, breach of implied-in-fact contract, and taking claims.

OPINION

We review Claims Court decisions for errors of law and clearly erroneous findings of fact. *Cooper v. United States*, 827 F.2d 762, 763 (Fed.Cir.1987); *Milmark Services, Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir.1984). Because this case was before the Claims Court on the government's motion for judgment on the pleadings, each of the well-pled allegations in the complaints is assumed to be correct, and the court must indulge all reasonable inferences in favor of the plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Owen v. United States*, 851 F.2d 1404, 1407 (Fed.Cir.1988).

I. *The Contract Claims*

The Claims Court held that the plaintiffs could not establish reformation or breach claims on the facts pled. The court referred to its limited contractual jurisdiction and stated that jurisdiction is conferred only where the government has agreed to be bound. It observed that it had no authority to write contracts, or contract clauses,

for the United States by means of reformation where there has been no agreement, citing *American President Lines, Ltd. v. United States*, 821 F.2d 1571, 1582 (Fed. Cir.1987).

The Claims Court stated that it is undisputed that there was no agreement between the parties with respect to the now required tailings stabilization. Because the existence of the tailings hazard was not knowable at the time of the contract negotiations, there was no mutual mistake and no agreement between the parties that could be placed into effect through reformation. The court observed that only those costs that were knowable and subject to actual negotiation formed the basis for the fixed prices that the AEC agreed to pay.

The Claims Court also dismissed the plaintiffs' breach claims, holding that because no agreement on the tailings stabilization was or could have been negotiated, the plaintiffs have no breach claims to assert. The court dismissed Western Nuclear's implied-in-fact contract claim, stating that an implied-in-fact contract theory is not a viable claim in the absence of an agreement that would support reformation. Moreover, the court held that Western Nuclear could not show there was an implied-in-fact tailings hazard contract unrelated to the negotiated uranium purchase agreements.

A. Reformation

The plaintiffs all seek recovery of the costs of tailings disposal on the theory of contract reformation. According to the plaintiffs, the parties to the uranium and thorium contracts made a mutual mistake concerning the necessary tailings disposal, and that mutual mistake requires equitable reformation of the contracts to provide that the government will pay for tailings stabilization. In the Joint Appellants' Brief, the plaintiffs describe the mistake: "[T]he parties were mutually mistaken concerning whether the tailings piles posed potential long-

term health hazards and thus whether extensive and costly mill stabilization and plant decommissioning measures were necessary to eliminate those potential hazards." Joint Br. at 23.

We hold that the plaintiffs' allegations are insufficient because they have failed to allege a mistake that can support reformation.

A party seeking to state a claim for reformation of a contract under the doctrine of mutual mistake must allege four elements:

(1) the parties to the contract were mistaken in their belief regarding a fact;

(2) that mistaken belief constituted a basic assumption underlying the contract;

(3) the mistake had a material effect on the bargain; and

(4) the contract did not put the risk of the mistake on the party seeking reformation.

See Restatement (Second) of Contracts §§ 151-152, 155 (1981); *National Presto Indus., Inc. v. United States*, 338 F.2d 99, 107-09, 167 Ct.Cl. 749 (1964), *cert. denied*, 380 U.S. 962, 85 S.Ct. 1105, 14 L.Ed.2d 153 (1965).

A "mistake" that can support reformation is a belief that is not in accord with the facts. Restatement (Second) of Contracts § 151. To satisfy this element of a reformation claim, a plaintiff must allege that he held an erroneous belief as to an existing fact. If the *existence* of a fact is not known to the contracting parties, they cannot have a belief concerning that fact; therefore, there can be no "mistake."

Reformation serves to bring the parties' written contract in accord with their agreement. Professor Corbin states:

> Reformation is not a proper remedy for the enforcement of terms to which the defendant never assented; it is a remedy the purpose of which is to make a mistaken writing conform to antecedent expressions on which the parties agreed. These antecedent expressions of agreement may have been such as to constitute a valid informal contract, in which case reformation is merely a step in the enforcement of that contract. The written document was intended to be no more than the integration in writing of the terms already agreed upon. In so far as it differs from those terms it is mistaken and will be corrected.

3 *Corbin on Contracts* § 614 at 723 (1960). He emphasizes that "a court will not decree reformation unless it has convincing evidence that the parties expressed agreement and an intention to be bound in accordance with the terms that the court is asked to establish and enforce." *Id.* at 725.

In *American President Lines*, 821 F.2d 1571, we stated, "The purpose and function of the reformation of a contract is to make it reflect the true agreement of the parties on which there was a meeting of the minds." *Id.* at 1582. In the absence of mistake, fraud, accident, or illegality, a court cannot change the terms of a contract. *Id.*

This court cannot reach the equities of the reformation question. It is clear that reformation can be ordered only where there is an agreement to be given effect. The circumstances alleged by the plaintiffs are such that there could have been no agreement regarding the tailings costs because the existence of the tailings hazard was not recognized by the parties. The parties could not have formed a mutually mistaken belief concerning a fact whose existence they could not recognize. Therefore, there has been no mistake that can support reformation.

In the cases where courts have reformed a contract, the parties recognize the existence of a fact about which they could negotiate, they mutually form a belief concerning that fact, but their belief is erroneous. In those cases, the court may reform the contract to bring the parties' agreement in accord with the true state of the facts.

For example, in *National Presto*, 338 F.2d 99, the Court of Claims granted reformation of a contract to permit reimbursement for the cost of an additional step in a process of manufacturing artillery shells. Before the parties entered into the contract, they discussed whether an additional step was needed in which excess metal was shaved from the shells. Their contract did not include provision for the equipment for this additional step, but during the performance of the contract, it was determined that the additional step was in fact necessary. The plaintiff was required to obtain additional equipment. The court permitted reformation of the contract. Although the parties did not know of the need for the additional equipment, *id.* at 107, they clearly recognized that the equipment *might* be needed. They recognized the existence of a fact on which they could reach an agreement, and they formed an erroneous belief concerning that fact. Therefore, there was a mutual mistake, and reformation could bring their agreement in accord with the true state of the facts.

Similarly, in *R.M. Hollingshead Corp. v. United States*, 111 F.Supp. 285, 124 Ct.Cl. 681 (1953), the plaintiff agreed to sell DDT in metal containers to the government under a contract which required the chemical to be a clear, stable liquid. When the DDT subsequently turned cloudy, the government refused payment. The Claims Court denied the government's motion to dismiss, stating that when the parties entered into the contract, neither knew that it was impossible to store DDT in metal containers without a resulting loss of clear color. The clear color requirement was part of the government's

specifications, and the parties considered that fact when contracting. Their erroneous belief concerning that fact was their mistake.

Other cases in which courts have permitted reformation of contracts similarly show that the parties held an erroneous belief concerning a fact whose existence the parties recognized and about which they could reach agreement. *See, e.g., Southwest Welding & Mfg. Co. v. United States*, 373 F.2d 982, 179 Ct.Cl. 39 (1967) (the parties mistakenly believed the price of steel was lower than it actually was); *Walsh v. United States*, 102 F. Supp. 589, 121 Ct.Cl. 546 (1952) (the parties erroneously believed the minimum wage rate was a certain amount, even though it had increased earlier); *Aluminum Co. of America v. Essex Group, Inc.*, 499 F.Supp. 53 (W.D.Pa.1980) (the parties erroneously believed that the Wholesale Price Index would accurately represent nonlabor production costs for the purpose of a contractual escalation clause). *See also Bowen-McLaughlin-York Co. v. United States*, 813 F.2d 1221 (Fed.Cir.1987) (reformation permitted where the parties erroneously omitted certain price items that were in existence and could have been included in the contract). *Macke Co. v. United States*, 467 F.2d 1323, 199 Ct.Cl. 552 (1972), does not show a different rule. The opinion in that case does not indicate whether a "mistake" was made by the parties. Rather, the court "interpreted" or "reformed" the contract to conform to the parties' practical construction. *Id.* at 1328.

Appellants argue that the Claims Court's distinction between "knowable" and "unknowable" facts has no bearing on whether a plaintiff has properly stated a claim for relief by reformation. The appellants cite *Aluminum Co. of America* in which the district court observed "[t]he law of mistake has not distinguished between facts which are unknown but presently knowable, and facts which presently exist but are unknowable. Relief

has been granted for mistakes of both kinds." 499 F. Supp. at 64 (citations omitted). It is true that even though the *outcome* of a fact is unknowable, the parties can make a mistake concerning that fact. But where the *existence* of a fact is unknowable, the parties cannot have a belief concerning that fact, and they cannot make a mistake about it. Thus, in the famous case *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887), the contract for the sale of a cow was held to be voidable where the cow was assumed to be barren but later was discovered to be pregnant. The *existence* of the fact as to whether the cow was barren or fertile was known to the parties even if the *outcome* of that fact was unknown.

In this case, the plaintiffs' allegations of their "mistake" do not show that they held an erroneous belief concerning a fact whose existence the parties could recognize and about which they could negotiate agreement. The statements the plaintiffs make in their complaints and briefs demonstrate that the parties could not have contemplated the potential tailings hazard when they entered into the contracts. Therefore, they could not have reached an agreement on the now-required tailings stabilization, and they could not have held a mutually mistaken belief concerning the abatement of the tailings hazard.

The plaintiffs state, "Thus, as alleged in the complaints, when appellants' contracts were negotiated and performed the parties did not fully appreciate the extent and consequences of the potential health hazards posed by the uranium and thorium mill tailings, or that such hazards could not be abated absent extensive and costly remedial measures." Joint Br. at 12. They state, "It was not until the late 1970's that the long-term potential health hazards associated with mill tailings became widely recognized." Joint Br. at 13.

Atlas states in its supplemental brief, "The full record put before the Claims Court by Atlas underscores the critical fact that neither the Government nor Atlas appreciated the extent or consequences of the potential health hazard posed by this radiation." Atlas Br. at 5. Quivira's complaint states, "These costs were not and could not have been anticipated at the time the Contract was entered into. . . ." Quivira Complaint ¶ 29. Western Nuclear alleged that "[w]hen the original Contracts and modifications thereto were entered into between Western and the Government acting through the AEC, the then existing technology did not recognize any reason to perform any Reclamation or Decommissioning on mill tailings or mills." Western Nuclear Complaint ¶ 29. Atlantic Richfield stated that "neither party considered radiation levels in the produced wastes to represent a potential hazard or matter of concern" (Atlantic Richfield Complaint ¶ 14) and that "[the reclamation] costs were not and could not have been anticipated at the time the 1951 or the 1959 Contracts were entered into. . . ." Atlantic Richfield Complaint ¶ 40. Umetco alleged that "the parties to those Contracts did not contemplate that any extraordinary efforts to stabilize or manage the tailings would be necessary." Umetco Complaint ¶ 27. They also allege that "the state of scientific knowledge at the times the Union Carbide Contracts were entered into and performed had not permitted adequate understanding of the effects of uranium mill tailings." Umetco Complaint ¶ 30. Homestake, also, alleged that "[the reclamation] costs were not and could not have been anticipated at the time the Contracts which are the subject of this Complaint, or any of the modifications or amendments thereto, were executed." Homestake Complaint ¶ 27. Pathfinder stated that "[the reclamation] costs were not and could not have been anticipated at the time the Contracts were executed." Pathfinder Complaint ¶ 20.

The plaintiffs' own statements and allegations demonstrate that the hazard associated with tailings was not, and indeed could not have been, within the contemplation of the parties when they entered into the contracts. Their statements clearly show the correctness of the Claims Court's ruling that the existence of the hazard was not knowable at the time of the negotiations. The Claims Court correctly stated that because it was not possible for the hazard to have been known to the parties, no agreement could have been reached on this matter which can now be put into effect through reformation. If the existence of the hazard was beyond the contemplation of the parties, they could form no belief concerning that fact. There can be no "mutual mistake" to support reformation here.

B. Breach of Express Contract

All of the plaintiffs other than Atlas asserted breach of express contract claims. In their complaints, they allege that the government has breached the uranium and thorium contracts by not paying for the cost of tailings stabilization and mill decommissioning. The parties alleged that the contracts were designed to reimburse the milling companies for all reasonable costs associated with the production of uranium and thorium concentrate. Also, the parties alleged that tailings disposal was a reasonable cost, as shown by certain contract provisions allowing reimbursement for tailings disposal. The latter allegation is based on the "stretch-out" agreements between the government and the parties under which the uranium deliveries were "stretched out" past the contract termination date to account for decreased demand for the concentrate. As the plaintiffs have alleged in their complaints, the price of the concentrate for the "stretch-out" period was to be determined based on past costs incurred by the producer, including the past costs of tailings disposal.

The Claims Court did not err in granting judgment on the pleadings dismissing the plaintiffs' breach of express contract claims. The plaintiffs have failed to allege any contract provision that the government breached in not paying the costs of tailings stabilization. The complaints admit that the contracts were fixed price contracts, although the price was determined by obtaining or forecasting the producer's costs for the contract period plus a reasonable profit. Quivira Complaint ¶¶ 8, 12; Western Nuclear Complaint ¶¶ 14, 21; Atlantic Richfield Complaint ¶¶ 11, 15; Umetco Complaint ¶¶ 18, 21; Homestake Complaint ¶¶ 8, 12; Pathfinder Complaint ¶¶ 8, 11. The plaintiffs have not alleged that the government has not paid the prices agreed to in the contracts.

More importantly, the plaintiffs alleging a breach of contract admitted in their complaints that the contracts contained no provision concerning tailings stabilization costs. Kerr-McGee Complaint ¶¶ 24, 25; Quivira Complaint ¶ 13; Western Nuclear Complaint ¶ 21; Atlantic Richfield Complaint ¶ 16; Umetco Complaint ¶ 27. *See also* Homestake Complaint ¶¶ 27, 35; Pathfinder Complaint ¶¶ 20, 28.

The plaintiffs rely on *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562 (Fed.Cir.1987), and argue that the absence of contract clauses specifically referring to tailings stabilization costs does not justify dismissal of their breach claims. Their reliance is misplaced. In *Alvin*, the court construed a contract provision regarding the payment of general real estate taxes. The *Alvin* plaintiffs relied on that specific contract term to argue that the Postal Service was required to pay "special assessments" that replaced the general real estate taxes. While that form of tax may have been unforeseen at the time the *Alvin* plaintiffs entered into the contracts with the government, the contracts included a specific provision that could be construed to cover the new taxes. In the present case, the plaintiffs have pointed to no

provision that can be construed to require payment of stabilization costs.

The plaintiffs' arguments that certain contract provisions *did* require reimbursement of tailings costs and the costs of restoration and clean-up of sites and facilities are unpersuasive. As discussed above, that reimbursement provision was in the "stretch-out" agreements, in which the price of uranium concentrate for 1969-70 deliveries was to be determined based on costs incurred between 1963 and 1968. The plaintiffs have not alleged that the government has failed to pay the price agreed to in the stretch-out agreements based on the prior costs. They have admitted that the stretch-out agreements did not anticipate the stabilization or reclamation costs incurred after 1968, or specify which party would be responsible for those costs. Quivira Complaint ¶ 17; Atlantic Richfield Complaint ¶¶ 26, 27. *See also* Homestake Complaint ¶¶ 17, 18, 27; Pathfinder Complaint ¶¶ 13, 20.

Finally, the plaintiffs argue that they are entitled to pursue alternative theories of recovery. They assert that it is improper to deem allegations that a contract does not specifically address tailings stabilization costs as equivalent to a concession that there is no basis for a breach claim. While plaintiffs can plead alternative bases of recovery, they must still plead sufficiently to support their claims. In this case, the plaintiffs have pointed to no specific provision that was breached. Therefore, it is not improper to look to the plaintiffs' admissions of what the contracts do *not* contain.

Western Nuclear's breach of contract claim is based on another theory. According to Western Nuclear, the government unilaterally modified the uranium contracts with the passage of the UMTRCA and the adoption of regulations requiring tailings stabilization. The contract allegedly provided for an "equitable adjustment" in the price after such unilateral modification by the government. The alleged provision is not in evidence. How-

ever, if it was the standard clause, it provided adjustment for changes by the contracting officer not relevant of course to these changes by Act of Congress. In any event Western Nuclear's breach claim on this theory is barred by the Sovereign Acts Doctrine. Under that doctrine, the government is not contractually liable for acts taken in its sovereign capacity for the public good. As the Supreme Court explained in *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925) (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384 (1865)):

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, *modify*, obstruct or violate the particular contracts into which it enters with private persons. . . .

(Emphasis added.) *See also Tony Downs Foods Co. v. United States*, 530 F.2d 367, 370-71, 209 Ct.Cl. 31 (1976) (sovereign acts doctrine barred price relief where excess performance costs were the result of an Executive order terminating a price freeze). The UMTRCA and its regulations are sovereign acts which the government has undertaken for the public good. Those acts are not a contractual modification of the agreement with Western Nuclear and cannot alone serve as the basis for a breach claim.

C. Breach of Implied-In-Fact Contract

Western Nuclear, Homestake, and Pathfinder have asserted breach of implied-in-fact contract claims. Western Nuclear's theory is that it was the intent of the parties that if the government "in its capacity as a

sovereign" performed a sovereign act and therefore made performance more difficult or expensive, the government would bear the added costs. Homestake's and Pathfinder's theory is that it was the intent of the parties that the plaintiffs would be compensated for all costs of production, including all costs associated with mill tailings.

The Claims Court did not err in dismissing the implied-in-fact contract claims. As explained in *Porter v. United States*, 496 F.2d 583, 204 Ct.Cl. 355 (1974), *cert. denied*, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975), an implied-in-fact contract is one "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Id.* at 590, quoting *Baltimore & O.R.R. v. United States*, 261 U.S. 592, 597, 43 S.Ct. 425, 426, 67 L.Ed. 816 (1923). As fully set out above, the parties have admitted that the extensive tailings stabilization which is now required was not even contemplated by the parties at the time of the contracts. Therefore, there can have been no negotiation and "meeting of the minds" that could create an implied-in-fact contract respecting the cost of the stabilization.

In addition, the plaintiffs cannot in this case argue that the cost of tailings stabilization was to be borne by the government in view of the "intent" of the contracts to reimburse all costs. The existence of an express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract. *ITT Fed. Support Services v. United States*, 531 F.2d 522, 528 n. 12, 209 Ct.Cl. 157 (1976). As fully set forth above, the plaintiffs have admitted that although the contract prices were determined by considering the plaintiffs' costs, the prices were in fact set by the contracts. The stabilization costs are not "entirely unrelated" to the costs included in the

contract prices. Therefore, there can be no implied agreement to pay costs over and above those prices. Unlike the complaint in *W.R. Cooper Gen. Contractor, Inc. v. United States*, 843 F.2d 1362 (Fed.Cir.1988), the plaintiffs' allegations and admissions in their complaints do not even raise the possibility of the existence of an implied-in-fact contract.

Finally, the plaintiffs cannot argue that increased obligations respecting tailings disposal create an implied agreement to reimburse the additional costs. The requirement of tailings stablization and mill decommissioning was not an exercise of the government's contractual powers, but of its powers as sovereign to act for the public good. The plaintiffs' contract claims seeking to impose liability for this sovereign act are barred by the Sovereign Acts Doctrine. *Cf. Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986); *Owen v. City of Independence*, 445 U.S. 622, 645 n. 28, 100 S.Ct. 1398, 1412-13, 63 L.Ed.2d 673 (1980); *Horowitz v. United States*, 267 U.S. at 461, 45 S.Ct. at 344; *Hedstrom Lumber Co. v. United States*, 7 Cl.Ct. 16, 25-29 (1984).

D. The Claims Court's Jurisdictional Reasoning

The Claims Court relied on its limited contractual jurisdiction under 28 U.S.C. § 1491 in resolving the issues raised by the government's motion for judgment on the pleadings respecting the plaintiffs' contract claims. 15 Cl.Ct. 681, 686. The Claims Court stated that its contractual jurisdiction is conferred only when the government has agreed to be bound. *Aetna Cas. & Sur. Co. v. United States*, 655 F.2d 1047, 1059, 228 Ct.Cl. 146 (1981). An express or implied-in-fact contract is required: the Claims Court has no jurisdiction over an implied in law contract. *See Porter v. United States*, 496 F.2d at 590 n. 5.

The plaintiffs have alleged an appealing fact situation. According to the plaintiffs, the government induced them

to enter the fledgling uranium industry, apparently assuring them of profits for many years. As required by the government, the plaintiffs sold much of their entire uranium output exclusively to the government. Years later, after the contracts were completed, it was determined that the tailings produced in the milling operations were potentially dangerous, and the plaintiffs were forced to stabilize them at their own expense. The plaintiffs now seek to impose an obligation on the government to reimburse those tailings costs. As discussed above, the tailings hazard was not contemplated by the parties, and the plaintiffs have alleged no contract provision requiring the government to pay the stabilization costs. Thus, any contractual claim against the government would arise, not out of the government's agreement to be bound, but out of an obligation that is imposed by law. Regardless of the alleged "justness" of the plaintiffs' claims, the Claims Court has no jurisdiction over them. The Claims Court's jurisdiction is limited, and where the government has not agreed to be bound, either expressly or impliedly, there is no contractual jurisdiction.

Moreover, the plaintiffs' circumstances are not as compelling as they might appear. The plaintiffs exercised their business judgment when they willingly entered into the uranium procurement contracts with the government without including escalation clauses. The contracts apparently provided them a guaranteed demand for their production at a profit for years. The plaintiffs have not alleged that they are protected by a price adjustment provision in the contracts or that the contracts were price redeterminable. *See Bowen-McLaughlin-York*, 813 F.2d at 1223. Thus, when unforeseen costs arose, their business judgment turned out to be wrong. Their breach and reformation claims cannot permit them to renegotiate their contracts in order to take into account matters not considered when the contracts were negotiated.

The merits of the plaintiffs' contract claims need not be reached. Their complaints fail to state redressable claims.

II. *Western Nuclear's Taking Claim*

The Claims Court also dismissed Western Nuclear's taking claim. Western Nuclear alleged that the UMTRCA requires it to spend very large sums of money for reclamation and decommissioning of the tailings and its mill upon termination of its license. Western Nuclear alleged that the amount of money it will be required to spend is greater than the value of the mill, and that such a requirement is an unconstitutional taking under the Fifth Amendment.

The Claims Court held that Western Nuclear cannot set forth a valid taking claim in the circumstances pleaded. The Claims Court stated that there has been no physical invasion of the property, and Western Nuclear has not alleged that it has been deprived of all beneficial use of its property. The court held that the government may regulate the use of land or a business and may require the owner to spend additional revenue for health and safety reasons without the regulation being found a taking requiring compensation. Individuals hold their property subject to the limitation that they do not use it in dangerous or noxious ways. The Claims Court also observed that the government has implemented similar regulations designed to protect the public health and safety, such as the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982). According to the Claims Court, Western Nuclear's taking theory would require compensation for those forced to comply with the national standards on air pollutants.

We hold that the Claims Court correctly dismissed Western Nuclear's taking claim. On the circumstances alleged, Western Nuclear cannot show that a compensable taking has occurred.

The power of a court to order compensation for a government action is limited. As the Supreme Court has stated,

> The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision.

United States v. Willow Run Power Co., 324 U.S. 499, 502, 65 S.Ct. 761, 764, 89 L.Ed. 1101 (1945). Thus, the Fifth Amendment requires compensation for losses due to government action only where there has been a "taking" of "property" for public use.

In this case, Western Nuclear has not alleged a physical taking of any of its property. Its complaint alleges only that it will be required to spend sums of money for reclamation of tailings and mill decommissioning. Requiring money to be spent is not a taking of property. *See United States v. Sperry Corp.*, —— U.S. ——, 110 S.Ct. 387, 395 n. 9, 107 L.Ed.2d 290 (1989) (deduction of a tribunal user fee from settlement award not a physical occupation requiring just compensation). Western Nuclear belatedly asserts on appeal that the UMTRCA will require it to transfer to the government the uranium tailings, the property affected by the mill site, and the tailings disposal area and that this constitutes a permanent occupation of its property. We do not reach these arguments for the complaint that is at issue does not contain these allegations nor were they addressed in the Claims

Court decision now appealed. Thus, on the facts as alleged, there has as yet been no physical taking.

The Supreme Court has not developed a set formula for determining whether a taking of property has occurred. Rather, that determination is made by engaging in ad hoc, factual inquiries into the circumstances of each particular case. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. at 224, 106 S.Ct. at 1025. Three factors have "particular significance": (1) the character of the government action; (2) the economic impact of the regulation on the plaintiff; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Id.* at 224-25, 106 S.Ct. at 1025-26. *See also Chang v. United States*, 859 F.2d 893, 895 (Fed.Cir. 1988). It is not necessary in every case to undertake an evidentiary hearing on the issue of whether a taking has occurred. Summary dismissal of a taking claim is appropriate where the circumstances alleged in the complaint, even if taken as true and all reasonable inferences are drawn in favor of the plaintiff, cannot establish that a taking has occurred. *See Chang* (motion to dismiss for failure to state a claim); *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed.Cir.) (summary judgment), *cert. denied*, —— U.S. ——, 109 S.Ct. 61, 102 L.Ed.2d 39 (1988). In this case, examination of the circumstances alleged by Western Nuclear in light of the three factors set forth by the Supreme Court shows that the Claims Court correctly dismissed Western Nuclear's taking claim.

1. *The Nature of the Government Action.* The Supreme Court has recognized that the nature of the government's action is "critical" in the determination of whether a taking has occurred. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 107 S.Ct. 1232, 1243, 94 L.Ed.2d 472 (1987). In this case, the government action is the regulatory requirement to spend money for tailings stabilization and mill decommissioning

as a condition of license termination. 42 U.S.C. § 2113. That action does not invade or permanently appropriate Western Nuclear's property for public use. Rather, the UMTRCA safeguards the public against potential hazards of tailings radiation and radon gas emissions by requiring the owners and operators of uranium mills to stabilize the tailings and mill site to minimize the health hazards. *See* 42 U.S.C. § 7901.

Congress set forth explicit findings regarding the need for tailings stabilization and control, and it made clear its specific purpose in enacting the UMTRCA. Congress found that "the protection of the public health, safety, and welfare and the regulation of interstate commerce require that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and . . . other environmental hazards. . . ." *Id.* The government action complained of is the result of Congress' exercise of its power in order to protect the health, safety, and welfare of the public.

In *Connolly* the Supreme Court considered a statute that required employers withdrawing from a pension plan to pay into the plan an additional amount corresponding to the employer's proportionate share of the plan's unfunded vested benefits. The Court held that the requirement to pay an amount greater than that which the employer was contractually obligated to pay was not a taking. The Court stated that "[t]his interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation." *Id.* 475 U.S. at 225, 106 S.Ct. at 1026. *See also Radioptics, Inc. v. United States*, 621 F.2d 1113, 1127, 223 Ct.Cl. 594 (1980) ("where the purpose of a regulation which causes interference with property rights

is to prevent injury to the public welfare as opposed to merely bestowing upon the public a non-essential benefit, compensation under the fifth amendment is not required.").

The uranium tailings were created by Western Nuclear's production of uranium. Congress has determined that those tailings are potentially hazardous to the public health. Pursuant to Congress' power to protect the general health, safety, and welfare. Congress has now required Western Nuclear to stabilize the tailings it has created. Such government action does not constitute a "taking." *See Keystone*, 480 U.S. at 491-92, 107 S.Ct. at 1245-46 ("Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.") (footnote and citations omitted) (quoting *Mugler v. Kansas*, 123 U.S. 623, 665, 8 S.Ct. 273, 299, 31 L.Ed. 205 (1887)). *See also Allied-General*, 839 F.2d at 1576 ("We think the basic rule that is dispositive here is that as against reasonable state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public.").

2. *The Economic Impact of the UMTRCA.* Even though the UMTRCA will require Western Nuclear to spend large amounts of money to stabilize the uranium tailings and Western Nuclear may be completely deprived of the use of that money, the financial burden of the Act cannot be considered in a vacuum. *See Keystone*, 480 U.S. at 497, 107 S.Ct. at 1248; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978). In this case, Western Nuclear has alleged that the tailings stabilization will cost more than its mill is worth. However, comparison of the cost of tailings stabilization to the value of its mill does

not show the economic impact of the regulations, other than merely suggesting that the cost is a large amount. Western Nuclear has *not* claimed that the government has interfered with its production of uranium or has made the use of its mill unprofitable. The allegations Western Nuclear has made do not show any economic impact that would support a determination that a "taking" has occurred.

3. *Interference With Investment-Backed Expectations.* Finally, Western Nuclear's allegations do not show any interference with its investment-backed expectations as would support a "taking" determination. From the outset of the uranium procurement program, the nuclear industry has been highly regulated, as the plaintiffs admit. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227, 106 S.Ct. at 1027, quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 146, 3 L.Ed.2d 132 (1958). The only "expectation" that Western Nuclear could have under the circumstances it has alleged is that it expected it would not have to spend its own money to remediate health and environmental hazards created by its production of uranium. Such an expectation cannot be a reasonable commercial expectation.

The nature of the government action, as well as the circumstances alleged by Western Nuclear, clearly show that the UMTRCA is not a taking that requires compensation. The Claims Court correctly dismissed Western Nuclear's taking claim.

CONCLUSION

We have considered the government's alternative arguments for affirming the Claims Court. Except as incorporated in the above discussion, they are not persuasive.

In enacting the UMTRCA, Congress chose to place the great burden of stabilizing the uranium and thorium tailings on the producers rather than on the public fisc after January 1, 1978. While this may force the plaintiffs to spend large amounts of money, they cannot show that their contracts with the government may be reformed or that the government has breached the contracts. In addition, the UMTRCA does not constitute a taking that requires compensation. For these reasons, the decision of the Claims Court is affirmed.

COSTS

Each side shall bear its own costs on this appeal.

AFFIRMED.

APPENDIX B

UNITED STATES CLAIMS COURT

Nos. 281-83C, 143-84C, 144-84C, 565-84C, 576-84C, 579-84C, 580-84C and 581-84C

ATLAS CORPORATION, KERR-MCGEE CHEMICAL CORPORATION, QUIVIRA MINING COMPANY, WESTERN NUCLEAR, INC., ATLANTIC RICHFIELD COMPANY, UMETCO MINERALS CORPORATION and UNION CARBIDE CORPORATION, HOMESTAKE MINING COMPANY OF CALIFORNIA, INC., PATHFINDER MINES CORPORATION

v.

THE UNITED STATES

Oct. 31, 1988

OPINION

MEROW, Judge:

Plaintiffs are corporations, or successors to corporations, which participated in the contractual uranium procurement program of the then Atomic Energy Commission (AEC). This program commenced in the 1940's and ended in 1970. As a result of recent scientific understanding as to the hazards of low level radiation, waste residues of the uranium production process, known as mill tailings, must now be stabilized at considerable expense.

In this litigation, plaintiffs seek to recover this expense from the United States.

In each case defendant moves, pursuant to RUSCC 12(c) and 12(h)(2), for judgment on the pleadings. It is asserted that plaintiffs failed to state a claim for relief. Each plaintiff has filed a brief in opposition to the government's motion and defendant has responded. Consolidated oral argument has been held.

As this matter comes before the court on a motion for judgment on the pleadings, the allegations in the complaints are considered to be correct. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). These allegations must, however, be examined in the relevant historical context and, to this end, in resolving the issues raised, the court may also consider certain material outside the pleadings such as official documents, matters of general public record and historical publications. *Hohri v. United States*, 586 F.Supp. 769, 773 (D.D.C.1984), *aff'd*, 847 F.2d 779 (Fed.Cir.1988). *See McNamara Construction, Ltd. v. United States*, 206 Ct.Cl. 1, 5, 509 F.2d 1166, 1168 (1975).

The AEC's contractual uranium procurement program involved in the instant claims spawned considerable prior litigation in the United States Court of Claims and the resulting reported decisions and findings of fact set forth relevant official documents and historical context. *See Gay v. United States*, 174 Ct.Cl. 420, 356 F.2d 516, *cert. denied*, 385 U.S. 898, 87 S.Ct. 202, 17 L.Ed.2d 130 (1966); *Industrial Uranium Co. v. United States*, 180 Ct.Cl. 50, 376 F.2d 868 (1967).

Background

Starting in the late 1940's and proceeding through the 1950's, the United States government was involved in the development of the domestic uranium processing industry. The government entered into contracts with various private companies for the production of uranium con-

centrate and thorium through the AEC. The AEC was succeeded by both the Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE). The uranium production process produces waste residues known as mill tailings which emit a low level of radiation into the environment, mainly in the form of Radon 222, which is a radioactive gas. At most production facilities, *i.e.*, "mills," the producers have deposited the tailings in large "tailings piles" in areas near to the mills. The tailings are now recognized to pose other potential environmental hazards.

The plaintiffs in these cases were either awarded a production contract by the AEC or have acquired or merged with the original contractor and have succeeded to the interests and obligations under the original contracts and subsequent modifications. In the case of the Kerr-McGee Chemical Corporation, the plaintiff is the successor in interest to thorium nitrite production contracts, the performance of which also created mill tailings with radon emissions. No significant differences between thorium or uranium production has been raised in this matter.

As set forth in the pleadings and described in the above-cited decisions of the Court of Claims, it is undisputed that in the 1950's the AEC conducted an aggressive uranium development program. The AEC policy is described in Findings 11, 13, 45 in *Gay v. United States*, 174 Ct.Cl. at 440-41, 468, 356 F.2d 516, which summarize the AEC's Domestic Uranium Circulars, as then published in the Federal Register, as follows:

> 11. Beginning in 1948, the AEC formulated its program for development of domestic sources of uranium, and its announced policy was to stimulate private industry to engage in wide-spread prospecting, exploration and development of uranium ore reserves, and, since the United States was to be the sole purchaser of uranium, to give adequate guaran-

tees as to price and period of purchase in order that private industry could finance and operate uranium mines and mills.

In repeated public announcements, the AEC made plain its policy to limit its direct purchase of uranium ores, and to have uranium mills privately owned and operated, with raw material procurement by the AEC to be principally in the form of uranium concentrates sold by the mills to the AEC under negotiated written contracts.

* * * *

13. The AEC considered and rejected early in the formulation of its domestic uranium program the establishment of a uniform price at which it would purchase uranium concentrate from the mills. It could not arrive at a uniform price because it was impossible to forecast operating costs and depreciation schedules for different milling operations.

Consequently, the AEC determined and announced publicly that all uranium concentrate purchases would involve individually negotiated contracts for the construction and operation of privately owned mills, with the contracts providing for purchase of the mill concentrates, the price to be arrived at by taking into account the ore cost and the estimated milling cost, including plant amortization and profit.

* * * *

45. The terms of all uranium concentrate or mill contracts were individually negotiated between AEC and the various private companies who owned and operated the mills. It was necessary to investigate and establish that sufficient reserves of uranium ore of adequate grade were available to sustain miling operations for an adequate period of time, that such available ores were amenable to economical metallurgical processing, that adequate design had been

> prepared for the mill, that the proposed mill operator had management ability and financial capacity, and that an acceptable price to the AEC could be reached. The contract price for uranium concentrate varied from contract to contract and was negotiated on the basis of consideration of such factors as the "ore cost," determined by application of the Circular 5 price schedule to both captive and custom ores, the estimated milling costs, which varied depending upon the size of the mill and the metallurgical process required for the particular ore, amortization of the cost of the mill in relation to the life of the uranium concentrate contract, and a reasonable profit to the mill owner, arrived at by consideration of capital investment and related factors.
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Accordingly, it is not disputed in this matter that the AEC uranium purchase contracts were individually negotiated with the producers with the fixed price per pound of uranium concentrate that the AEC would pay determined, for the contract periods involved, on the basis of the ore cost, the estimated milling costs, plant amortization over the contract period and a reasonable profit.

In their submissions, the parties differ as to whether these negotiated contracts, pursuant to the AEC circulars, were "fixed-price" (as the government asserts) or "cost-plus-profit" (as plaintiffs assert). The historical record makes clear that the AEC's published policy was to arrive at a fixed-price per pound for the concentrate delivered, which price was, in turn, developed by obtaining or forecasting the producer's costs for the contract period plus a reasonable profit, and dividing these by the concentrate quantity covered. In these respect, both parties are partially correct in their asserted contract labels.

The purchase program involved was originally to expire in 1962, but was stretched out to 1970 while a commercial market for uranium concentrate was developed.

No government purchases subsequent to 1970 are involved in this matter. With the advent of production for commercial concentrate sales, the waste residue or tailings so generated have been commingled with those resulting from production under the prior AEC contracts.

It is undisputed that none of the AEC contracts involved in this matter contains any express provision assigning responsibility for the decommissioning and decontamination of the facilities after final delivery of the concentrate, or for reclamation or cleanup activities at the site, or for stabilization and reclamation of the tailings piles.

Knowledge of the hazardous nature of low level radiation such as produced by mill tailings was beyond the state of the art during the period of time the contracts involved in these matters were negotiated and performed. It was only in the late 1970's that it became widely recognized that radon emanating from uranium and thorium mill tailings posed a long-term potential health hazard.

Because of the potential environmental and health hazards, Congress enacted the Uranium Mill Tailings Radiation Control Act (UMTRCA), Pub.L. No. 95-604, 92 Stat. 3021 (Nov. 8, 1978), *codified at* 42 U.S.C. § 7901, *et seq.* Under Title I of the Act, the federal government has responsibility for the stabilization and decommissioning of all inactive mill sites which were not licensed on January 1, 1978. *See, generally*, 42 U.S.C. §§ 7912-7919.

Title II of the UMTRCA authorizes the development of regulatory requirements for the stabilization and decommissioning of mill sites which remained active after January 1, 1978. *See, generally*, 42 U.S.C. §§ 2022, 2113. Under Title II, the licensee is responsible for complying with federal requirements regarding stabilization of the tailings piles, decontamination and decommissioning of the plants, and reclamation of the plant site and its surrounding land. *See* 42 U.S.C. § 2113.

Congress directed the Environmental Protection Agency (EPA) to establish general health and safety standards for radiological hazards associated with mill tailings (42 U.S.C. § 2022(b)(1)). The EPA has issued final standards governing actively licensed milling and disposal sites, 40 C.F.R. § 192 (1983), and the NRC has issued regulations incorporating the EPA guidelines (10 C.F.R. §§ 40 and 150 (1985)). These matters are discussed in detail in *American Min. Congress v. Thomas*, 772 F.2d 617 (10th Cir.1985), *cert. denied*, 476 U.S. 1158, 106 S.Ct. 2275-76, 90 L.Ed.2d 718 (1986) (petition for review of EPA standards for the cleanup and disposal of uranium mill tailings originating from designated inactive mill sites) and *American Min. Congress v. Thomas*, 772 F.2d 640 (10th Cir.1985), *cert. denied*, 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 718 (1986) (challenge to EPA standards for active mill tailings sites).

Many facilities covered by Title II do not contain tailings related to the old AEC contracts. However, the plaintiffs in the instant cases held licenses on January 1, 1978 for active facilities which did contain tailings relating to the government contracts, which are now commingled with tailings produced under subsequent commercial nuclear contracts. As such, plaintiffs assert they have expended and will expend considerable sums in connection with obviating the hazards associated with the tailings generated from uranium concentrate sales to the AEC. Recovery of these costs is sought.

Discussion

The main theory on which plaintiffs seek to recover the cost of eliminating the environmental hazards associated with their mill tailings is reformation of the AEC uranium purchase contracts on the basis of an asserted mutual mistake of fact. Plaintiffs claim that both parties to the AEC uranium purchase contracts were mis-

taken as to the hazardous nature of mill tailings and, had this hazard been then known, the costs now required to ameliorate the situation would have been incorporated, in some way, in the transactions.

The parties have devoted substantial argument to the theory of contract reformation in general, but it is concluded that the matter must be resolved by reference to the nature of the contractual jurisdiction this court can exercise pursuant to 28 U.S.C. § 1491.

As has been held numerous times with respect to claims based upon contracts implied by law, 28 U.S.C. § 1491 does not confer jurisdiction in a situation where, between private parties, an agreement can be imposed; rather, jurisdiction to render a judgment against the United States is conferred only where the government has agreed to be bound. *Aetna Casualty and Surety Co. v. United States*, 228 Ct.Cl. 146, 164, 655 F.2d 1047, 1059 (1981). Either an express or an implied-in-fact contract is required. *See W.R. Cooper General Contractor, Inc. v. United States*, 843 F.2d 1362 (Fed.Cir.1988). Similarly, for reformation to form the predicate for a money judgment under 28 U.S.C. § 1491, there must be a prior agreement by the government as to the provisions involved which can be so given effect. The Claims Court has no authority to write contracts, or contract clauses, for the United States by means of reformation. *American President Lines, Ltd. v. United States*, 821 F.2d 1571, 1582 (Fed.Cir.1987).

In the circumstances presented with respect to the uranium purchase contracts, it is undisputed that there exists no agreement between the parties with respect to the now required elimination of mill tailings hazards. There was no mutual mistake, as the existence of the hazard was not knowable at the time of the negotiations. Because it was not possible for the hazard to have been known to the parties when contracting, no agreement could have been made on this matter which can now be

placed into effect by means of reformation. The consensual nature of the contract jurisdiction conferred by 28 U.S.C. § 1491 requires that the agreement be limited to what was actually negotiated on the basis of the circumstances then known to the negotiators. Even if it could now be ascertained what the negotiators would have agreed to, had future events been known, this would not constitute the contract actually negotiated. In interpretation issues, "the language of a contract must be afforded the meaning derived from the contract by a reasonably intelligent person acquainted with the contemporary circumstances." *Firestone Tire & Rubber Co. v. United States*, 195 Ct.Cl. 21, 30, 444 F.2d 547, 551 (1971). *See Alvin, Ltd. v. U.S. Postal Service*, 816 F.2d 1562, 1565 (Fed.Cir.1987); *City of Oxnard v. United States*, 851 F.2d 344, 347 (Fed.Cir.1988); *Deloro Smelting and Refining Co. v. United States*, 161 Ct.Cl. 489, 497, 317 F.2d 382, 387 (1963).[1]

The "contemporary circumstances" involved with respect to the uranium purchase contracts precluded any actual agreement with respect to adding costs to obviate a hazard whose existence was not then known or knowable. Only those costs (incurred or estimated) which were then knowable and subject to actual negotiation

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[1] Similarly, the standard for holding a party responsible for contract damages is premised upon foreseeability at the time of contracting. *Northern Helex Co. v. United States*, 207 Ct.Cl. 862, 877, 524 F.2d 707, 714 (1975), *cert. denied*, 429 U.S. 866, 97 S.Ct. 176, 50 L.Ed.2d 146 (1976). A hazard that was not knowable to the parties when contracting could not be foreseeable. No reason exists to depart from this general contracting principle when considering reformation. The agreement actually reached in the contemporaneous circumstances is controlling. *See also Glopak Corp. v. United States*, 851 F.2d 334 (Fed.Cir.1988) (unconscionability must be determined at the time the contract was entered into); *Brubrad Co. v. U.S. Postal Service*, 404 F.Supp. 691 (E.D.N.Y.1975), *aff'd*, 538 F.2d 308 (2d Cir.), *cert. denied*, 429 U.S. 834, 97 S.Ct. 99, 50 L.Ed.2d 99 (1976) (reformation on the basis of subsequent events denied).

formed the basis for the fixed prices the AEC agreed to pay, per pound of uranium concentrate delivered, as was explained in the published AEC policy set out, *supra*.[2]

In *Bowen-McLaughlin-York Co. v. United States*, 813 F.2d 1221 (Fed.Cir. 1987), incurred costs were mistakenly omitted in determining a fixed price and reformation was granted. In the instant matter, plaintiffs cannot plead that any then knowable relevant cost was mistakenly omitted from negotiations for the fixed uranium concentrate prices AEC paid, and no valid basis for reformation has been shown.

Plaintiffs argue, however, that reformation is supported by *National Presto Industries, Inc. v. United States*, 167 Ct.Cl. 749, 338 F.2d 99 (1964), *cert. denied*, 380 U.S. 962, 85 S.Ct. 1105, 14 L.Ed.2d 153 (1965). However, in the unique facts of that case, the mutual mistake on which recovery was premised involved the need for certain turning equipment which was in existence, had been the subject of actual negotiations, and was knowable such that a consensual agreement supporting reformation under 28 U.S.C. § 1491 was an available remedy. That is not the case here.

Accordingly, it is concluded that, upon the facts pleaded as considered in their context, plaintiffs can in no way establish a claim for reformation of their AEC uranium purchase contracts to add provisions providing compensation for the subsequent costs involved in removing the hazards of mill tailings.[3]

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[2] An agreement to pay any cost forever into the future would not have been sanctioned by the published AEC policy which was premised upon determining a fixed price for concentrate delivered during the contract period. Moreover, any such agreement would raise substantial authority questions. *See California-Pacific Utilities Co. v. United States*, 194 Ct.Cl. 703 (1971).

[3] Moreover, to add provisions to reflect an agreement to pay the costs now known to be required to eliminate the mill tailings hazards would not have been a simple undertaking. The AEC's pub-

Plaintiffs, with the exception of Atlas Corporation, also argue that the costs of eliminating the tailings hazards may be recovered on a breach of contract theory. This approach necessarily assumes that removal of the subsequently discovered tailings hazards is a part of the uranium purchase contracts. As it has been concluded that no such agreement could have been negotiated, so that reformation is not possible, it follows that plaintiffs have no breach of contract claims to assert. They have been paid the negotiated prices for the uranium concentrate delivered and the contracts, absent adding cleanup and reclamation provisions regarding mill tailings by reformation, call for no additional monetary relief.[4]

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lished contracting policy was to negotiate a fixed price to be paid per pound of uranium concentrate delivered. If the need for subsequent environmental cleanup costs had been knowable and if the parties had determined that they would be negotiated, the question would have arisen as whether to include the cost as a part of the price paid for each pound of uranium concentrate, or whether a separate provision was required. Usually, advance payments are not made. *See* 31 U.S.C. § 3324. While the AEC undoubtedly had broad authority to contract for uranium concentrate, the published parameters for the program did not indicate that payments, other than for delivered concentrate, were contemplated. If the costs were incorporated as a part of the fixed price paid for delivered uranium, any agreement would, presumably, have had to provide assurances that some portion of the price paid by AEC would be segregated and set aside for this subsequent environmental cleanup obligation. Perhaps a reserve fund would be required, calling for investment decisions. Some consideration as to the possibility that a successor corporation(s) would become involved would be needed. Plaintiffs have, however, set forth no such "antecedent expressions on which the parties agreed." *Sperry Rand Corp. v. United States*, 201 Ct.Cl. 169, 179, 475 F.2d 1168, 1174 (1973).

[4] On the pleaded facts, no AEC (or successor agency) contracting officer has, under the authority of the uranium purchase contracts involved, issued any order(s) requiring removal of the subsequently recognized tailings hazards. The obligation to undertake this activity arises from the provisions of the UMTRCA. Given the apparent extent of the tailings undertakings plaintiffs indicate are now required by UMTRCA or otherwise, even if the AEC uranium

Western Nuclear also argues for recovery on an implied-in-fact contract theory, but this cannot constitute a viable approach in the absence of an agreement such as would support reformation. The AEC uranium procurement program, as set out in the published materials, was limited to contracts for uranium concentrate at a negotiated price over a defined contract period. There is no sanction for any separate implied-in-fact tailings hazard contract unrelated to the negotiated uranium purchase agreements. *See ITT Federal Support Services, Inc. v. United States*, 209 Ct.Cl. 157, 168 n. 12, 531 F.2d 522, 528 n. 12 (1976).

Western Nuclear also asserts that it has at all times acted as an agent for the government in its uranium dealings so that it does not own mill tailings. However, assuming this allegation to be correct, Western Nuclear does not show how this circumstance would produce a claim for monetary relief within the jurisdiction afforded by 28 U.S.C. § 1491. Perhaps the allegation is intended to reflect a position in defense of any enforcement action under UMTRCA.

Western Nuclear asserts in its complaint that compliance with the UMTRCA and regulatory requirements will cause it to spend more money "upon termination of its license without renewal" than the mill itself is worth. This circumstance is claimed to amount to a taking of its property, entitling it to just compensation under the Fifth Amendment to the Constitution.

It is concluded that Western Nuclear cannot set forth a valid "taking" claim in the circumstances pleaded. There is no physical invasion of the property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.

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purchase contracts were considered to remain viable for purposes of amendment (reformation), this might well not be possible. Any amendment(s) of such a magnitude could well be beyond the scope of the original contracts as negotiated. *Edward R. Marden Corp. v. United States*, 194 Ct.Cl. 799, 442 F.2d 364 (1971).

419, 435-38, 102 S.Ct. 3164, 3175-78, 73 L.Ed.2d 868 (1982). Western Nuclear does not claim that, pursuant to the law and regulations, the government has physically interfered with its commercial production of uranium or that such production has been or now is commercially unprofitable in and of itself because of government regulation, as opposed to being difficult and expensive to clean up after and to cease operations. Thus, the plaintiff has not alleged that it has been deprived of all beneficial use of its property. *See, e.g., Deltona Corp. v. United States*, 228 Ct.Cl. 476, 657 F.2d 1184 (1981), *cert. denied*, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982).

In this case, mill tailings from the AEC contract deliveries are now commingled with commercial tailings, all of which must be cleaned up and the mill made safe after operation ceases. However, such requirements in and of themselves do not give rise to a compensable taking even though the costs thereof are quite high. *See, e.g., Allied-General Nuclear Services v. United States*, 839 F.2d 1572, 1576 (Fed.Cir. 1988); *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1002 (Fed.Cir. 1987); *Carruth v. United States*, 224 Ct.Cl. 422 and 446, 627 F.2d 1068 (1980); *Radioptics, Inc. v. United States*, 223 Ct.Cl. 594 at 620, 621 F.2d 1118 (1980). That is, the government may regulate the use of land or a business through its police powers, *i.e.*, for health and safety reasons, even if such regulation causes the owners of such property to spend additional revenue, without such regulation being found a constitutional taking requiring compensation. Individuals hold their property subject to the limitation that they not use it in dangerous or noxious ways. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Matter of Quanta Resources Corp.*, 739 F.2d 912 (3rd Cir.1984), *aff'd, Midlantic National Bank v. N.J. Dept. of E.P.*, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986).

In this case, Western Nuclear alleges the mill and its production value are diminished and are less than the plaintiff's past and future costs of complying with the regulatory requirements However, these allegations do not surmount those made in other cases before the Supreme Court which were not sustained as Fifth Amendment takings.[5] For example, in *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), the statute which mandated the destruction of red cedar trees without compensation for their value in order to protect apple orchards was held not to constitute a taking. In *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the enactment of a zoning ordinance limiting the uses of unimproved property which reduced the property's value by 75 percent was not found to constitute a taking. In *Hadacheck v. Sebastian*, 239 U.S. 894, 36 S.Ct. 143, 60 L.Ed. 348 (1915), an ordinance precluding the manufacture of brick did not constitute a taking even though it reduced the value of the petitioner's land to less than one-tenth its prior value.

In addition, if a taking were to be found under these circumstances, many regulations the government implements to protect the environment and/or the health and safety of its citizens would result in compensation to those who are responsible for the "noxious" or "nuisance-type" uses as they could claim a taking based on their costs of compliance. For instance, the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, provides for national standards on the level of air pollutants. The act provides penalties for noncompliance. 42 U.S.C. § 7413. Under Western Nu-

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[5] *See* Michelman, "Property, Utility, And Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L.Rev. 1165, 1191 (1967), in which the author comments on "the absence of 'magnitude' considerations from decisions sustaining curbs on 'noxious' or 'nuisance-like' uses of property; for these may, it seems, be quelled by public authority without any compensation for huge losses representing near-total devaluation of holdings." (Footnote omitted.)

clear's theory, those required to comply with the Clean Air Act standards would have to be compensated for a constitutional taking because the costs of compliance may be high.[6]

Therefore, for the above-stated reasons and because the requirements imposed by the UMTRCA and the implementing regulations cannot be more technologically or financially onerous than those imposed by other environmental protection measures such as the Clean Air Act, no taking claim has been set forth requiring further proceedings for its resolution.

Western Nuclear also claims that the UMTRCA violates the equal protection clause of the Fifth Amendment because licensees of active sites must pay for reclamation and decommissioning while the government pays those costs for inactive mill sites. However, pursuant to

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[6] *See Union Electric Co. v. EPA*, 427 U.S. 246, 256, 96 S.Ct. 2518, 2525, 49 L.Ed.2d 474 (1976), wherein the court stated that "[a]fter surveying the relevant provisions of the Clean Air Act Amendments of 1970 and their legislative history, we agree that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administration's consideration of a state implementation plan." In addition, Justice Powell in his concurring opinion at 270, n. 1, states: "The record is clear beyond question that at least the sponsors and floor leaders of the Clean Air Act intended that industries unable to comply with approved state implementation plans, whether because of economic or technological infeasibility, would be 'closed down.' * * * Indeed * * * it is clear from the legislative history that even total technological infeasibility is 'irrelevant.'" *See also Lead Industries Ass'n v. Environmental Protection Agency*, 647 F.2d 1130 (D.C.Cir.1980), *cert. denied*, 449 U.S. 1042, 101 S.Ct. 621, 66 L.Ed.2d 503 (1980), in which the court, upon consideration of the Clean Air Act and its legislative history, stated at 1150, "[I]f there is a problem with the economic or technological feasibility of the lead standards * * * [the] party affected by the standards, must take its case to Congress, the only institution with the authority to remedy the problem. [Footnote omitted.] Thus, it is clear that Congress may enact statutes directing industry compliance which is not feasible either economically or technologically and such legislation may be upheld."

section 115 of the UMTRCA, the Department of Justice has the responsibility of reporting to Congress on whether it would be possible to obtain reimbursement for the government funds expended pursuant to the act from former owners of the inactive mill sites. *See* 42 U.S.C. § 7925 (1978). Thus, rather than expressing an intent to pay the entire bill for all mill sites, it is clear that Congress desired that those who operated the mills pay the costs of cleanup.

The tenor of the argument submitted indicates that plaintiff's concern is not so much that equal treatment is provided under the law as that the government reimburse past costs and pay future expenses of complying with the regulations. However, this type of challenge to the act and the regulations does not constitute a claim for a money judgment against the government that would be within the jurisdiction of this court. *See Carruth v. United States*, 224 Ct.Cl. 422, 445, 627 F.2d 1068 (1980), in which the court stated:

> This court has no jurisdiction over claims based upon the Due Process and Equal Protection guarantees of the Fifth Amendment, because these constitutional provisions do not obligate the Federal Government to pay money damages. *Walton v. United States*, 213 Ct.Cl. 755 (1977); *Muehlen v. United States*, 209 Ct.Cl. 690 (1976); *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002 (1967).

In *Carruth* the plaintiff made a similar equal protection argument. In that case, farmers and shellers received different treatment pursuant to a federal regulation providing for indemnification for shellers with no comparable provisions for farmers with respect to peanuts which could not be sold. The court rejected that claim because there was no obligation under the asserted regulation for the government to pay money damages. Thus, Western Nuclear's assertion does not state a claim for relief as the statute involved, UMTRCA, does not

provide compensation. A general claim based solely on the equal protection clause must fail since this court would not, under any set of facts, be able to order monetary relief.

Finally, Western Nuclear claims that the UMTRCA constitutes an *ex post facto* law which requires it to reclaim the mill tailings and decommission its mill, all of which were created prior to passage of the act, because its license was in effect on January 1, 1978, which was 10 months prior to the act's passage. Thus, plaintiff was not allowed to cease operation and escape the consequences of the act prior to its effective date. The government argues that this type of claim is not for a money judgment against the government and, consequently, does not come within the jurisdiction of this court pursuant to 28 U.S.C. § 1491.

Based on the allegations in Western Nuclear's complaint and its brief, this claim is not within the jurisdiction of the Claims Court. As the court stated in *Eastport Steamship Corp. v. United States*, 178 Ct.Cl. 599, 605, 372 F.2d 1002, 1007 (1967):

> Section 1491 of Title 28 of the United States Code allows the Court of Claims to entertain claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States * * *". But it is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the noncontractual claims we consider under Section 1491 can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the

> plaintiff asserts that he is nevertheless entitled to a payment from the treasury. [Footnote omitted.]

Plaintiff is not basing this particular claim on a contract theory or on the theory that it is seeking the return of money previously paid to the government.[7] Plaintiff may have spent money to clean up its mill tailings, but such money has not been alleged to have been paid to the government. Thus, its claim must be that some law, regulation or the Constitution grants it the right to be paid a certain sum. As to this type of claim, the court stated in *Eastport Steamship Corp.*, 178 Ct.Cl. at 607, 372 F.2d at 1008-09:

> Where the claimant is not suing for money improperly exacted or retained (the first class defined above), the historical boundaries of our competence have excluded those instances in which the basis of the federal claim—be it the Constitution, a statute, or a regulation—cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant, but in which some other principle of damages has to be invoked for recovery. * * *
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> Under Section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, this court cannot give relief under Section 1491 * * *.

Here, it is clear that the UMTRCA and the regulations do not mandate compensation by the government for

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[7] Plaintiff does not claim that it has had to pay a civil penalty because of noncompliance and that it is suing for the return of its money which was illegally extracted. In fact, plaintiff has not paid any penalties and states it wants to avoid having to pay them by complying with the remedial requirements (at the government's expense).

plaintiff's compliance costs. Rather, the statute itself mandates just the opposite, *i.e.*, that the plaintiff and not the government pay for the remedial actions required of the active mill licensees. *See* 42 U.S.C. §§ 2113 and 7925. In addition, there is no language in the *ex post facto* clause itself which requires the payment of money damages for its violation.[8] U.S. Const. Art. I, § 9, cl. 3. *See generally Murray v. United States*, 817 F.2d 1580 (Fed. Cir.1987), in which the court found that the Claims Court did not have jurisdiction over the appellants' claim that they were deprived of their property without due process of the law because the Fifth Amendment's due process clause contained no language requiring damages for its violation.

Thus, no relief may be granted Western Nuclear by this court since the assertion that the plaintiff is owed compensation because the UMTRCA is claimed to constitute an *ex post facto* law does not present a claim within the court's jurisdiction.

Western Nuclear requests that any of its constitutional claims, determined to be outside the jurisdiction of the Claims Court, be transferred to the United States District Court for the District of Colorado. It does not appear that constitutional challenges to the enforcement of environmental cleanup statutes on equal protection or retroactivity theories have met with success. *See United States v. Union Gas Co.*, 832 F.2d 1343, 1357 (3rd Cir. 1987); *United States v. Northeastern Pharmaceutical*, 810 F.2d 726 (8th Cir.1986); *United States v. Conserva-*

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[8] In addition, as the court stated in *Korte v. Office of Personnel Management*, 797 F.2d 967, 972 (Fed.Cir.1986), "from 'earliest times,' the Supreme Court has construed the *ex post facto* provision to apply only to criminal laws." (Citation omitted). Thus, since the penalties imposed pursuant to the UMTRCA are civil, not criminal, the express constitutional proscription against *ex post facto* laws would not be relevant. *See* section 110 of the UMTRCA of 1978, 42 U.S.C. § 7920; *United States v. D.K.G. Appaloosa, Inc.*, 829 F.2d 532, 540-45 (5th Cir.1987).

tion Chemical Co., 619 F.Supp. 162 (D.C.Mo.1985). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19, 96 S.Ct. 2882, 2893-94, 49 L.Ed.2d 752 (1976). However, this does not militate against presentation of these matters by Western Nuclear before a court having jurisdiction to resolve them with the benefit of the filing date in this matter as provided in 28 U.S.C. § 1631. *TVA v. United States*, 13 Cl.Ct. 692, 696 (1987).

Conclusion

As it has been determined that plaintiffs are entitled to no relief under any state of facts which could be proved on the pleaded allegations as viewed in the historical context of the AEC's uranium procurement program, it is ORDERED that final judgments shall be entered as follows:

(1) The complaints in these matters, except No. 565-84C, shall be dismissed with no costs to be assessed;

(2) All claims in No. 565-84C, with the exception of the constitutional equal protection and *ex post facto* claims, shall be dismissed with no costs assessed;

(3) No. 565-84C shall be transferred, pursuant to 28 U.S.C. § 1631, to the United States District Court for Colorado for appropriate action with respect to the remaining constitutional equal protection and *ex post facto* claims.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1205, -1206, -1207, -1208
-1209, -1210, -1211, and -1212

ATLAS CORPORATION,
KERR-MCGEE CHEMICAL CORPORATION,
QUIVIRA MINING COMPANY,
WESTERN NUCLEAR, INC.,
ATLANTIC RICHFIELD COMPANY,
UMETCO MINERALS CORPORATION and
UNION CARBIDE CORPORATION,
HOMESTAKE MINING COMPANY OF CALIFORNIA, INC., and
PATHFINDER MINES CORPORATION,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

On Appeal from the United States Claims Court
in Case No. 281-83 C

JUDGMENT

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Feb. 2, 1990

Issued as a Mandate: February 23, 1990

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 281-83 C

ATLAS CORPORATION

v.

THE UNITED STATES

JUDGMENT

Pursuant to the opinion of October 31, 1988, directing entry of final judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

FRANK T. PEARTREE
Clerk of Court

November 2, 1988 By: /s/ Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77(k)(2) is amended to read:

"Filing Notice of Appeal . . . . . $105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

IN THE UNITED STATES CLAIMS COURT

No. 143-84 C

KERR-MCGEE CHEMICAL CORPORATION

v.

THE UNITED STATES

JUDGMENT

Pursuant to the opinion of October 31, 1988, directing entry of final judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

FRANK T. PEARTREE
Clerk of Court

November 2, 1988 By: /s/ Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77 (k) (2) is amended to read:

"Filing Notice of Appeal . . . . . $105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

IN THE UNITED STATES CLAIMS COURT

No. 581-84 C

PATHFINDER MINES CORPORATION

v.

THE UNITED STATES

JUDGMENT

Pursuant to the opinion of October 31, 1988, directing entry of final judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

FRANK T. PEARTREE
Clerk of Court

November 2, 1988 By: /s/ Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77(k)(2) is amended to read:

"Filing Notice of Appeal . . . . . $105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

IN THE UNITED STATES CLAIMS COURT

No. 144-84 C

QUIVIRA MINING COMPANY

v.

THE UNITED STATES

JUDGMENT

Pursuant to the opinion of October 31, 1988, directing entry of final judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

FRANK T. PEARTREE
Clerk of Court

November 2, 1988 By: /s/ Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77 (k)(2) is amended to read:

"Filing Notice of Appeal . . . . . $105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

IN THE UNITED STATES CLAIMS COURT

No. 579-84 C

UMETCO MINERALS CORPORATION

and

UNION CARBIDE CORPORATION

v.

THE UNITED STATES

JUDGMENT

Pursuant to the opinion of October 31, 1988, directing entry of final judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

FRANK T. PEARTREE
Clerk of Court

November 2, 1988 By: /s/ Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77(k)(2) is amended to read:

"Filing Notice of Appeal . . . . . $105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

APPENDIX E

STATEMENTS PURSUANT TO SUP. CT. RULE 28.1

Based on information furnished by counsel for the companies in question, the following are the parents, affiliates, and non-wholly-owned subsidiaries of petitioners.

Atlas Corporation has no parents, affiliates, or non-wholly-owned subsidiaries.

Kerr-McGee Chemical Corporation is a wholly-owned subsidiary of Kerr-McGee Corporation. The non-wholly-owned affiliates and subsidiaries of the Kerr-McGee Chemical Corporation are:

Basic Management, Inc.
Bikita Minerals (Private) Limited
Brewster Phosphates
Cooljarloo Management Services, Pty., Ltd.
Downtown Airpark, Inc.
Fishermen's Petroleum Company PLC
Kerr-McGee Canada Ltd.
Kerr-McGee Egypt, Ltd.
Kerr-McGee Gabon Limited
Kerr-McGee Limited
Kerr-McGee Malaysia Limited
K.M.A. Sales Pty. Ltd.
KMM Australia International Pty. Ltd.
National Titanium Dioxide Company Limited (Cristal)
Piro Implementation, Inc.
Texoma Pipe Line Company
Transnor Drilling Company Limited
Transocean Drilling Company Inc.
Transocean Drilling Company Limited
Transocean Drilling Company (U.K.), Limited
Transshore Drilling Company Limited
Transworld Drilling Company Limited
Transworld Drilling Company (Nigeria) Limited

Transworld Perfuracoes Maritimas Limitada
White Shoal Pipeline Corporation

Pathfinder Mines Corporation is a wholly-owned subsidiary of PMC Acquisition Corporation, which is a wholly-owned subsidiary of Compagnie Generale des Matieres des Nuclearies, which is a wholly-owned subsidiary of COGEMA, Inc., which is a wholly-owned subsidiary of CEA Industries. Pathfinder Mines Corporation is affiliated with NUMATEC, Inc., MINERCORP, Inc., UREX, Inc., and Pathfinder Gold Corporation. Pathfinder Mines Corporation has no non-wholly-owned subsidiaries.

Quivira Mining Company has no subsidiaries, and is wholly-owned by Rio Algom Mining Corporation, which is wholly-owned by Rio Algom, Inc, which in turn is wholly-owned by Rio Algom Limited. The RTZ Corporation, PLC owns 52% of Rio Algom Limited. Stock in The RTZ Corporation and the remaining stock in Rio Algom Limited are publicly traded.

Umetco Minerals Corporation is a wholly-owned subsidiary of Union Carbide Corporation, and has no affiliates, or non-wholly-owned subsidiaries.

Union Carbide Corporation has no parents, affiliates, or non-wholly-owned subsidiaries.

(2)

No. 89-1705

Supreme Court, U.S.
FILED
JUL 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ATLAS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that government contractors had failed to state a claim that mutual mistake of fact required contract reformation.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1705

ATLAS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 895 F.2d 745. The opinion of the United States Claims Court (Pet. App. 27a-46a) is reported at 15 Cl. Ct. 681.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a) was entered on February 2, 1990. The petition for a writ of certiorari was filed on May 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the period following the Second World War, the Federal Government, acting through the Atomic Energy Commission (AEC), initiated a major program designed to encourage the domestic production of uranium and other sources of atomic energy. Pet. App. 2a. The AEC prompted development of the industry by contracting with private companies to purchase uranium production, funding research and development activities, and providing technical support. *Ibid.*

Petitioners, or their predecessors, held contracts with the AEC from 1950 to 1970 to supply uranium and/or thorium concentrate to the federal government at a fixed-price per pound. Pet. App. 2a-3a, 31a. Each contract was individually negotiated and the contract price was determined based upon ore cost, estimated milling costs, plant amortization over the contract period, and a reasonable profit. Pet. App. 31a. After 1970, petitioners were engaged in the production of uranium and thorium for commercial use. Pet. App. 32a.

The production process results in significant quantities of a sand-like waste residue, known as mill tailings, which has been deposited into large piles on land adjacent to the mills. Pet. App. 3a, 29a. The large piles now also include mill tailings generated from the commercial production which began in 1970. Pet. App. 32a. The tailings emit a low level of radiation, primarily in the form of radon gas. Pet. App. 29a. Knowledge that the low level of radiation emitted by the tailings poses a long-term potential health hazard was nonexistent when the contracts were negotiated and performed; it became widespread in the late 1970's. Pet. App. 32a.

To alleviate this hazard, Congress in 1978 enacted the Uranium Mill Tailings Radiation Control Act (UMTRCA), Pub. L. No. 95-604, 92 Stat. 3021 (codified at 42 U.S.C. 2022, 2113, 2114, 7901-7942). Title I of the UMTRCA provides that the Federal Government has responsibility for the stabilization and decommissioning of all inactive mill sites which were not licensed on January 1, 1978. 42 U.S.C. 7911-7919. Title II of the UMTRCA provides that the licensees of sites as of January 1, 1978, are responsible for complying with federal requirements regarding stabilization, decontamination, and decommissioning of the plant sites. 42 U.S.C. 2113. The Environmental Protection Agency (EPA) and the Nuclear Regulatory Commission subsequently issued regulations governing such activities. 10 C.F.R. 40, 150; 40 C.F.R. 192. As a result of the UMTRCA and the regulations issued pursuant to it, petitioners have been required to undertake costly measures to stabilize, decommission, and reclaim the tailings piles and the plant sites. Pet. App. 33a.

Petitioners' contracts with the government, from 1950 to 1970, were long ago completely fulfilled by the parties—the concentrate was delivered and the negotiated price paid in full. Pet. App. 15a, 37a. It is undisputed that none of the contracts at issue contains any express provision concerning responsibility for the cost of decommissioning and decontaminating the mills, clean-up and reclamation of the mill sites, or stabilization and reclamation of the tailings piles. Pet. 3; Pet. App. 32a.

2. Petitioners brought suit in the Claims Court seeking recovery of their stabilization and reclamation costs based upon various theories, including contract reformation, breach of express contract, and

breach of implied-in-fact contract.[1] Petitioners alleged that the parties to the contracts did not and could not have recognized the hazard posed by the mill tailings and that, had the hazard been known, the costs of obviating the hazard would have been included in the contract. Pet. App. 11a-12a.

The United States moved to dismiss the complaints for failure to state a claim upon which relief could be granted. With respect to petitioners' reformation claims, the United States explained that a court can reform a contract only to correct a mistake made by the parties in reducing their agreement to writing. Reformation thus could be granted only because of a mistake concerning the facts as they existed at the time the parties entered into the contract; a failure accurately to foresee the future was not a mistake upon which reformation could be granted. Because the UMTRCA and the extensive measures required to stabilize and reclaim the mills flowed from the unanticipated actions of Congress, the plaintiffs were not alleging a mistake as to existing facts but were seeking to have the court write a new agreement for the parties. Having failed to allege facts that would support a mutual mistake, the complaints thus failed to state a claim upon which the relief of reformation could be granted. Gov't Mot. for Judg. on Pleadings 16-21.

The Claims Court granted the government's motion to dismiss,[2] noting that its jurisdiciton was lim-

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[1] Petitioners have abandoned all theories here except for their claims for contract reformation based upon the doctrine of mutual mistake. Pet. i; Pet. 3 n.1.

[2] The court dismissed all counts of all complaints with the exception of two claims raised by Western Nuclear, Inc. Although Western Nuclear joined in the appeal filed with the

ited to enforcing an agreement that was actually negotiated by the parties and that it did not have jurisdiction to write a new agreement for the parties. Specifically, the court explained that

> for reformation to form the predicate for a money judgment under 28 U.S.C. § 1491, there must be a prior agreement by the government as to the provisions involved which can be given effect. The Claims Court has no authority to write contracts, or contract clauses, for the United States by means of reformation.

Pet. App. 34a. The court found that the circumstances pled precluded any actual agreement with respect to the costs of obviating the tailings hazard because "it was not possible for the hazard to have been known to the parties when contracting, [and therefore] no agreement could have been made * * * which can now be placed into effect." Pet. App. 34a-35a.[3]

3. The court of appeals affirmed. Pet. App. 1a-26a. It agreed that reformation was available only "to make [a contract] reflect the true agreement of the parties on which there was a meeting of the minds." Pet. App. 8a. In such cases, the court explained, "the parties recognize the existence of a fact about which they could negotiate, they mutually form

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Court of Appeals for the Federal Circuit, it has not joined in the petition.

[3] The Claims Court also explained that an indefinite agreement to pay some future cost "would not have been sanctioned by the published AEC policy which was premised upon determining a fixed price for [uranium] delivered during the contract period" and that it might have been beyond the scope of authority of a government officer to make such an agreement. Pet. App. 36a n.2.

a belief concerning that fact, but their belief is erroneous." Pet. App. 9a. Noting that in their complaints each of the petitioners stated that the hazard associated with the mill tailings was not within the contemplation of the parties when they entered into the contracts, the court concluded that the parties could not have formed any agreement regarding tailings costs and, consequently, could not have formed a mutually mistaken belief concerning those costs. Pet. App. 11a. In sum, the court found that petitioners "have failed to allege a mistake that can support reformation." Pet. App. 7a, 13a.

The court of appeals held that petitioners had also failed to state a claim for breach of an express contract or to demonstrate the existence of an implied-in-fact contract. Noting that their arguments must therefore reduce to claims that the government owed them an obligation "imposed by law," the court confirmed that the Claims Court was without jurisdiction to hear "implied in law" contract claims. Pet. App. 18a-19a. The court therefore affirmed the Claims Court's dismissal of the contract claims because petitioners had failed "to state redressable claims." Pet. App. 20a.

ARGUMENT

The court of appeals' decision is correct and consistent with well established rules of contract reformation. It does not conflict with any decision of this Court or any court of appeals. Nor does it introduce any new jurisdictional standard under the Tucker Act. Further review is therefore not warranted.

1. Petitioners' contention that the Claims Court improperly declined to reform their contracts with the United States is without merit. It hangs on the assertion (Pet. 5-7) that the Claims Court introduced into the law of mutual mistake a novel and dangerous concept when it discussed "knowable" and "unknowable" facts in resolving petitioner's reformation claim.

In fact, as the court of appeals made clear (Pet. App. 13a), the Claims Court was merely attempting by its distinction between "knowable" and "unknowable" facts to express the conventional doctrine that reformation is only available to enforce an agreement about existing facts reached by the parties. The court of appeals thus itself applied, and found petitioners' claims deficient according to, traditional principles of the doctrine of mutual mistake. Pet. App. 7a-10a.

Specifically, the court explained that a party seeking to state a claim for reformation based upon the doctrine of mutual mistake must allege:

(1) that the parties were mistaken in their belief regarding a fact;

(2) that the parties' mistaken belief constituted a basic assumption upon which the contract was based;

(3) that the mistake had a material effect on the parties' bargain; and

(4) that the contract did not put the risk of the mistake on the party seeking reformation.

Pet. App. 7a. See Restatement (Second) of Contracts § 151, at 383 (1981) (mistake "must relate to the facts as they exist at the time of the making of the contract") [hereinafter Restatement (2d)]; *id.* § 152, at 385 (mistake must concern "basic assumption" that has "material effect" on party who does not bear the risk of the mistake); *id.* § 155. The court explained that in order to satisfy the first element, "a plaintiff must allege that he held an erroneous belief as to an existing fact." Pet. App. 7a. See Restatement (2d) Ch. 6, at 379 (mistake must relate "to existing facts"). The court then reasoned that "[i]f the *existence* of a fact is not known to the contracting parties, they cannot have a belief concerning that fact." Pet. App. 7a (emphasis in original). Similarly, if the parties have no belief concerning a fact, there can be no agreement between them concerning that fact. Pet. App. 8a. The court of appeals correctly concluded that "[r]eformation is not a proper remedy for the enforcement of terms to which the defendant never assented; it is a remedy the purpose of which is to make a mistaken writing conform to antecedent expressions on which the parties agreed." *Ibid.* (quoting 3 A. Corbin, *Corbin on Contracts* § 614, at 723 (1960)).

This analysis is consistent with long-standing tenets of contract law. A court may reform a contract only "to make a writing express the bargain which the parties desired to put into writing." 13 S. Williston, *Williston on Contracts* § 1549, at 132 (3d ed. 1970); accord Restatement (2d) § 155, at 406; see, *e.g.*, *McNamara Construction of Manitoba, Ltd.* v. *United States*, 509 F.2d 1166, 1171 (Ct. Cl. 1975):

> For reformation we would need some antecedent expressions by the parties at variance with the terms of the contract or some articulated mutual assumption * * * which we would incorporate into the agreement or some indication that a mutual mistake existed as to a hard fact on which the parties had based the contract.

A court may not reform a contract to make a bargain the parties did not intend to make. See *Russell* v. *Shell Petroleum Corp.*, 66 F.2d 864, 867 (10th Cir. 1933) ("It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were."). Similarly, a court may not rewrite a contract for the parties or draw up a new agreement to cover an unforeseen situation. *American President Lines, Ltd.* v. *United States*, 821 F.2d 1571, 1582 (Fed. Cir. 1987). "[T]he erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here." Restatement (2d) § 151, at 383.

In this case, petitioners state (Pet. 6) that the parties' agreement was that the United States would pay the full costs of production. However, there is no evidence that, at the time the contracts were made, the parties recognized or agreed that the costs of production included the costs of stabilization and reclamation of the tailings. To the contrary, petitioners allege that the parties did not even contemplate the possibility that costs to stabilize and decommission the tailings piles would be incurred. Pet. App. 11a-12a.

That circumstance does not represent an "articulated mutual assumption" that was in error or a

mutual mistake of "hard fact." It is instead an allegation that the parties did not anticipate future legislative and regulatory action that made stabilization and decommission of the tailings piles necessary. As explained above, however, reformation is not available to conform a contract to what the parties "would have agreed" or "would have intended" had they known better. See 13 S. Williston, *supra*, § 1548, at 122; see also, *e.g.*, *id.* § 1549, at 134-135.[4]

2. Contrary to petitioners' contention (Pet. 6), the judgment in this case does not conflict with *Na-*

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[4] Petitioners assert (Pet. 8) that the court's analysis is inconsistent with the district court's reasoning in *Aluminum Co. of America* v. *Essex Group, Inc.*, 499 F. Supp. 53, 64 (W.D. Pa. 1980). There, the court rejected the distinction between facts which are "unknown but presently knowable," and facts which "presently exist but are unknowable," finding both sufficient to suport a claim of mutual mistake. However, as the court of appeals recognized here (Pet. App. 11a), the court in *Aluminum Co.* was using the terms in a different manner. Thus it explained that while the crucial fact —the predictive value of an indicator—was "not known and was scarcely knowable," it was "a matter of fact, existing at the time they made the contract." 499 F. Supp. at 64. Specifically, the district court determined that the parties' mistake concerning the accuracy of the Wholesale Price Index as an indicator of nonlabor costs "was essentially a present actuarial error."

In contrast, the court of appeals explained that where the very *existence* of a fact is unknowable, as here, "the parties cannot have a belief concerning that fact, and they cannot make a mistake about it." Pet. App. 11a. Here, neither the United States nor petitioners knew of the existence of any hazard associated with the mill tailings. Therefore, they could not make a mistake about the hazard, including a mistake about the cost of the hazard. The problem instead arises because of the parties' failure to predict that Congress would enact a statute requiring petitioners to expend money to stabilize the tailings piles.

tional Presto Industries, Inc. v. *United States*, 338 F.2d 99 (Ct. Cl. 1964), cert. denied, 380 U.S. 962 (1965). In *National Presto*, the parties were aware of the possibility of an additional manufacturing step, negotiated over whether to include the requirement in the contract, and agreed that the step was not needed for completion of the contract. During performance, it was determined that the additional step was, in fact, necessary. The court found that the parties had labored under a "misapprehension" about the existing technologies of the process. 338 F.2d at 108; see Pet. App. 9a. ("They recognized the existence of a fact on which they could reach an agreement, and they formed an erroneous belief concerning that fact."). Accord *R.M. Hollingshead Corp.* v. *United States*, 111 F. Supp. 285 (Ct. Cl. 1953) (parties mutually mistaken about possibility of performing contract requiring delivery of DDT in metal containers without a loss of clear color). By contrast, the parties in the case at hand failed to anticipate a future action by the government imposing a duty to clean up a hazard not yet recognized.

3. Petitioners assert (Pet. 8, 10-11) that the court's analysis of the law of mutual mistake precludes any possibility "that parties ignorant of a hazard may still enter into an agreement that encompasses the unforeseen liability." Not so. First, as the court of appeals noted (Pet. App. 19a), there are several methods by which petitioners might have protected their interests, such as including in their contracts an escalation clause, a price adjustment provision, or a contract provision making the contract price redeterminable. *Ibid.*[5]

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[5] Thus the court stated that, however compelling the facts, the conclusion was inescapable that petitioners' damages resulted simply from bad business decisions. The court ex-

Second, insofar as petitioners are actually seeking relief for subsequent liabilities imposed on their industry by the legislature, government contractors have no different or more privileged a claim to relief than do others. As this Court held long ago,

> The two characters which the government possesses as a contractor and as a sovereign cannot be * * * fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.

Horowitz v. *United States*, 267 U.S. 458, 461 (1925). The UMTRCA and its implementing regulations are "public and general" acts of government; they do not thereby alter pre-existing contractual obligations between the government and private parties.[6] See, *e.g.*, *Tony Downs Food Co.* v. *United States*, 530 F.2d 367, 370-372 (Ct. Cl. 1976); *D.R. Smalley & Sons* v. *United States*, 372 F.2d 505, 507 (Ct. Cl.), cert. denied, 389 U.S. 835 (1967).

4. Petitioners challenge (Pet. 6) the dismissal of their complaints as manifesting "an unprecedented and fundamental shift in the contractual jurisdiction

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plained that it was not within the jurisdiction of the Claims Court to permit petitioners "to renegotiate their contracts in order to take into account matters not considered when the contracts were negotiated." Pet. App. 19a.

[6] For example, there is no contention that the obligations imposed by UMTRCA and the regulations affect those who completed contracts with the government in 1970, and no longer held licenses for sites in 1978.

of the Claims Court." In making this argument, petitioners have confused the court of appeals' analysis of the law of mutual mistake with the court's analysis of the Claims Court's jurisdiction.

The court of appeals did not, as petitioners assert, create a new jurisdictional bar to contract claims. Instead, the court concluded that petitioners had failed to allege facts that would demonstrate the existence of an agreement which the court could enforce. Pet. App. 7a, 18a-20a. The court first considered, and affirmed, the Claims Court's holding that petitioners' complaints failed to state a claim that the contracts which they had concluded with the government should be reformed. Pet. App. 7a, 13a. The court of appeals then considered, and affirmed, the Claims Court's holdings that the complaints failed to allege the breach of any express contractual provision or facts demonstrating a meeting of minds that would create an implied-in-fact contract (Pet. App. 13a-18a), as required in order to establish the existence of jurisdiction in the Claims Court under the Tucker Act. See *W.R. Cooper General Contractor, Inc.* v. *United States*, 843 F.2d 1362 (Fed. Cir. 1988). Given petitioners' failure to allege facts that would establish a claim to contract reformation or the breach of an express or implied-in-fact contract, the court of appeals noted that petitioners' claims must reduce to an implied-in-law contract claim ("an obligation that is imposed by law" on the government) or a general equitable plea for "justness." Pet. App. 18a-19a. The court then confirmed the Claims Court's unexceptional holding that it had no jurisdiction over such claims. Pet. App. 19a; see *Merritt* v. *United States*, 267 U.S. 338, 341 (1925). The court of appeals thus concluded that the complaints had "fail[ed] to state redressable

claims." Pet. App. 20a. It therefore properly affirmed the Claims Court's dismissal of the claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ATLAS CORPORATION, KERR-McGEE CHEMICAL CORPORATION, PATHFINDER MINES CORPORATION, QUIVIRA MINING COMPANY, UMETCO MINERALS CORPORATION AND UNION CARBIDE CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

The Government's opposition brief misapprehends the nature and significance of the opinion of the court of appeals. That opinion expressly affirmed the Claims Court's reasoning that it lacked Tucker Act jurisdiction to hear a contract reformation claim where the mistake concerned "unknowable" facts. The court of appeals also attempted to demonstrate that dismissal

of petitioners' claims was consistent with the common law of contract reformation, but as shown in the petition for certiorari, that demonstration failed. The distinction between "unknown" and "unknowable" facts has no basis in either the common law or the Tucker Act, and its adoption serves to deny any forum to government contractors pursuing contract reformation claims based upon mutual mistakes as to latent hazards.

I.

Petitioners have alleged sufficient facts to satisfy the requirements for Claims Court jurisdiction under the Tucker Act and also to state a claim for reformation of contract based on a mutual mistake of fact.

Specifically, petitioners have alleged that they had agreements with the Government under which the Government agreed to compensate them for all significant costs associated with the production of uranium or thorium. Pet. App. 2a. It was known at the time of contracting that such operations would create tons of mill tailings and that such tailings would emit low-level radioactivity. Pet. App. 3a. The parties were mistaken, however, in their shared belief that these tailings did not pose a significant health hazard and would not require significant expenditures for disposal. Pet. App. 12a. As a result, their written agreements did not include any provision for these substantial costs. Now that the parties have discovered their shared error, petitioners seek to enforce their original bargain requiring compensation by the Government.

II.

The Government obscures the court of appeals' holding by introducing arguments that were not the basis for its opinion. Indeed, these arguments were made before both courts below and were adopted by neither of them. These arguments lack merit.

A. The Government characterizes the mistake at issue in this case as the parties' "fail[ure] to anticipate a future action by the government imposing a duty to clean up a hazard not yet recognized." Br. in Opp. 11. On this basis, the Government argues that petitioners' claims are not meritorious because the mistake at issue did not concern a fact in existence at the time of contracting but was instead an erroneous "prediction" of future events. Br. in Opp. 9-10.

This argument fails because petitioners have based their claims on the parties' failure to recognize facts in existence at the time of contracting: the facts that mill tailings posed a potentially serious health hazard and that abatement of this hazard would be expensive. These facts were no less true in the 1950's than they are today. Moreover, the passage of the UMTRCA in 1978 did not bring these facts into being. These facts have always been "in existence," and it is irrelevant whether one attributes current clean-up efforts to the UMTRCA, state regulations, the general safety requirements of the Atomic Energy Act of 1946, or good business practices. The fact that a mistake is subsequently revealed does not transform it into a mere error of "prediction." The hazard and the cost of abating the hazard were "hard" facts as to which the parties were mistaken at the time they entered

contracts intended to compensate petitioners for all costs related to their performances.

B. The Government also suggests that petitioners are claiming that passage of the UMTRCA rewrote the parties' original agreements. Br. in Opp. 12. This is simply incorrect. The petitioners are suing on their original agreements, which required compensation for all significant costs related to petitioners' operations. The Government's reliance on *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925), is thus completely misplaced. *Horowitz* would bar petitioners' claims only if they sued the federal government for passing the UMTRCA in its role as sovereign. Petitioners here, however, seek reimbursement based on their contracts, and *Horowitz* thus *protects* their right to pursue these claims. Under the reasoning of *Horowitz*, the fact that the United States, as sovereign, has passed a law requiring stabilization of mill tailings sites in no way affects whether petitioners may pursue contract actions seeking reimbursement from the Government in its role as a contractor.

III.

The court of appeals affirmed the dismissal of petitioners' claims because they sought reformation of contracts based upon allegedly "unknowable" facts and because, supposedly, no "actual" agreement could exist concerning such facts. *See* Pet. App. 18a-20a. This *same* reasoning was the basis both for the court's jurisdictional holding *and* its holding that petitioners failed to state a claim. *Compare id.* at 18a-20a *with id.* at 10a-13a. The validity of this reasoning is thus squarely presented for review. As explained below, this reasoning is unsound.

A. Neither the courts below nor the Government challenges the notion that contracts may be reformed by the Claims Court based upon a fact "unknown" to the parties. Indeed, the very existence of a mutual mistake presupposes that the parties are ignorant as to some fact relevant to their agreement. In the instant case, however, the court of appeals upheld the Claims Court's ruling that the parties' mistake concerned a fact that was both "unknown" *and* "unknowable"— and it adopted the Claims Court's reasoning that if the parties *could not* know of their error, there could be no agreement that could form the basis for Tucker Act jurisdiction or for reformation of contract. Pet. App. 13a, 18a-19a. This reasoning is both illogical and unprecedented.

B. As a matter of logic, "knowability" has no bearing on whether parties can reach an agreement concerning an unknown fact. If parties do not know something, the fact that they could not know it places them at no greater disadvantage in reaching an agreement that encompasses the fact. In *Bowen-McLaughlin-York Co.* v. *United States*, 813 F.2d 1221 (Fed. Cir. 1987), for example, the Government originally agreed to pay all costs associated with production under a contract. When it was discovered that the parties had failed to consider a particular cost in entering their written, fixed-price contract, reformation of contract was granted to require payment of that expense. In determining whether an underlying agreement to pay all costs—such as the one in *Bowen*—is an "actual" agreement, it makes no difference whether the costs omitted from the written contract are merely "unknown" or are also "unknowable" to the parties.

C. The Government attempts to rehabilitate the court of appeals' opinion by focusing on its discussion of *National Presto Industries, Inc.* v. *United States*, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).[1] In *National Presto*, the parties did not know of the need for an extra step in a new process of manufacturing artillery shells and did not know it would take a long time to discover that need and to perfect the process. *Id.* at 108-09. Nevertheless, the Court of Claims reformed the parties' contract to require Government contribution toward paying for this unknown step. The Government argues that *National Presto* is distinguishable because the parties in that case were aware there *might* be an additional manufacturing step—whereas here, the Government asserts, the parties had no intimation whatsoever that tailings were unsafe. Br. in Opp. at 10-11. The Government thus implicitly suggests that the test of whether a fact is "knowable" is whether the parties discussed and had some awareness of their possible error. In making this argument, however, the Government ignores the facts of the instant case and proposes a principle that squarely conflicts with the law of contract reformation.

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[1] The Government (Br. in Opp. at 10 n.4) and the court of appeals (Pet. App. 10a-11a) also discuss, and fail to distinguish, *Aluminum Co. of America* v. *Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980). In *ALCOA*, the parties knew that the Wholesale Price Index existed and they could (and did) have a belief as to its accuracy as an indicator of non-labor costs. *Id.* at 63-64. Similarly, the parties in the instant case knew tailings would exist and they could (and did) have a belief as to the hazards of tailings and disposal requirements. In both *ALCOA* and the instant case, notwithstanding that the parties could (and did) form a belief on a certain subject, the truth of the matter at issue was "unknowable."

D. The court of appeals recognized that the process of milling uranium and thorium produces large piles of mill tailings and that petitioners contend the parties *knew* at the time of contracting that the tailings would emit low-level radioactivity. Pet. App. 3a. Petitioners' complaints, as excerpted by the court of appeals, do not allege utter ignorance of radioactivity, but rather allege that the parties did not and could not know the potential seriousness of the hazard posed by mill tailings or the expense of abating that potential hazard. Pet. App. 12a. In both this case and in *National Presto*, the parties had sufficient knowledge to form a mistaken belief, but did not know and could not know everything about the fledgling industries in which they were engaged. 338 F.2d at 109. The fact that petitioners and the Government in this case could not know the extent of the hazard or of the expense they faced in no way conflicts with the allegation that their written agreements were based upon a mistaken assumption that the hazard was minimal and that no substantial expenditures would be needed for tailings disposal.

E. The Government, in attempting to extract a rule from *National Presto* that would exclude petitioners' claims, has suggested a standard that flatly contradicts the common law of contract reformation. To satisfy the Government, it appears, petitioners should not only have alleged that the facts at issue were "knowable," but that the parties were specifically aware of and discussed the possibility that their understanding was mistaken. *See* Br. in Opp. 11. This rule however, is not supported by *National Presto*[2]

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[2] In *National Presto*, "[t]he crucial error was as to the work

and was not adopted by the court of appeals. If the parties had been specifically cognizant of their possible error, then their deliberate failure to investigate or to include some relevant provision in their contract would constitute either "willful ignorance" or an "assumption of risk" by one of the parties. Under traditional common law principles, either situation would *bar* an action for reformation of contract.[3] Petitioners have not alleged such a situation here, and to require that petitioners make such allegations—which would necessarily defeat their claims—would be nonsensical.

IV.

The Government has failed to cite any case in which contract reformation or Tucker Act jurisdiction was denied because a fact as to which parties were mistaken was "unknowable." The simple reason for this failure is that the holding below is a novel—and er-

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necessary to show the need for turning equipment. On that point there was no consideration and no discussion." 338 F.2d at 109.

[3] *See, e.g.*, *Backus* v. *MacLaury*, 278 A.D. 504, 106 N.Y.S.2d 401 (1951) (where, at time of sale of a bull calf less than a month old, "[b]oth parties knew that the minimum age at which the fertility of the animal could be 'safely determined' was 'approximately twelve months,' " the buyers "assumed the chance of sterility 'as one of the elements of the bargain' "); 13 S. Williston, *A Treatise on the Law of Contracts* § 1543, at 75 (3d ed. 1970) ("[T]here must be excluded from consideration mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk."); 3 A. Corbin, *Corbin on Contracts* § 598, at 585-86 (2d ed. 1960) ("The same result obtains in any case where the risk of the existence of some factor or of the occurrence of an event is consciously considered in agreeing upon terms. There is no mistake; instead, there is awareness of the uncertainty, a conscious ignorance of the future.").

roneous—application of the distinction between "actual" and "implied-in-law" agreements that not only conflicts with common law principles of contract reformation but also improperly curtails the jurisdiction of the Claims Court.

The Government nowhere denies that petitioners' claims are of great value and that the decision below will deprive future Government contractors of the only forum in which they might pursue a claim for reformation of contract based on mutual mistake concerning unrecognized chemical or environmental hazards. The fact that such mutual mistakes could not have been discovered by the parties does not distinguish them from the more mundane errors found in a host of other contract reformation cases. The distinction between "unknown" and "unknowable" facts serves no purpose but to deny Claims Court jurisdiction over a class of reformation cases and thereby insulate the Government from substantial liability in an increasingly important field of litigation.

CONCLUSION

For the foregoing reasons, and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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